EDITOR'S NOTE

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No. 85-1716-CFX
Status: GRANTED

Title: Jean E. Welch, Petitioner
v.
State Department of Highways and Public Transportation, et al.

Docketed:
April 21, 1986

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Cucullu, Michael D.

Counsel for respondent: McCown, F. Scott

Entry	Date	Note	Proceedings and Orders
1	Apr 21 1986	G	Petition for writ of certiorari filed.
2	Apr 28 1986		Waiver of right of respondent St. Dept. of Hwy, etc. to respond filed.
3	Apr 30 1986		DISTRIBUTED. May 15, 1986
4	May 14 1986	R	Response requested.
5	Jun 12 1986		Brief of respondent St. Dept. of Hwy, etc. in opposition filed.
6	Jun 17 1986		REDISTRIBUTED. September 29, 1986
7	Oct 6 1986		Petition GRANTED. Justice Scalia OUT.
			**********
8	Nov 20 1986		Joint appendix filed.
9	Nov 20 1986		Brief of petitioner Jean Welch filed.
10	Nov 20 1986		Brief amicus curiae of AFL - CIO filed.
11	Dec 3 1986		Record filed.
12	Dec 3 1986		Certified copy of original record on appeal, 2 volumes, received.
14	Dec 8 1986		Order extending time to file brief of respondent on the merits until January 10, 1987.
15	Dec 19 1986		SET FOR ARGUMENT. Wednesday, March 4, 1987. (4th case).
16	Jan 8 1987		Brief of respondents St. Dept. of Hwy, etc., et al. filed.
17	Jan 9 1987		Brief amicus curiae of Council of State Governments, filed.
18	Jan 16 1987		CIRCULATED.
19	Mar 4 1987		ARGUED.

85 - 1716

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JEAN E. WELCH,

Petitioner,

v.

STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION and THE STATE OF TEXAS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the State Department of Highways and the State of Texas are immune from a Jones Act suit in U.S. District Court by a state employee/seaman by operation of the Eleventh Amendment to the U.S. Constitution.

2. Whether the doctrine of implied waiver of sovereign immunity as set forth in *Parden v. Terminal R.R. Co.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed. 233 (1964) is still viable.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

———

The Petitioner Jean E. Welch respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceedings on the 22nd day of January, 1986.

OPINIONS BELOW

The opinions of the District Court, the panel decision of the Court of Appeals and the en banc decision of the Court of Appeals appear in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit, sitting en banc, was entered on January 22, 1986, and this petition for certiorari was filed within ninety

(90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment 11

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against anyone of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

46 U.S.C. Section 688, The Jones Act

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injuries to railway employees shall apply; . . . Jurisdiction in such actions shall be under the Court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

Petitioner was employed as a seaman/marine technician by the Texas State Department of Highways and Public Transportation and the State of Texas. Her duties consisted of traditional seaman duties, and she was assigned to a fleet of vessels in navigation by virtue of her employment.

On March 4, 1981, Petitioner was severely injured as a result of the negligence of her employer and co-employees. On October 6, 1981, Petitioner filed suit against the Texas State Department of Highways and Public Transportation and the State of Texas pursuant to the Jones Act, 46 U.S.C. Section 688. The District Court granted the state's Motion to Dismiss, and Petitioner thereafter appealed to the Fifth Circuit Court of

Appeals. The Fifth Circuit Court of Appeals reversed the decision of the District Court and the Respondent timely petitioned for rehearing and hearing en banc. The Court of Appeals granted the hearing en banc, and thereafter affirmed the judgment of the District Court, dismissing Petitioner's complaint.

REASONS FOR GRANTING THE WRIT

I. THE ISSUES SUBMITTED HAVE NOT BEEN DECIDED BY THIS COURT.

The majority opinion of a divided Court states at the outset:

> The question raised by Welch bringing her Jones Act suit against her employer, the State of Texas, in federal court has been the subject of considerable doubt and confusion in the law.

It is, therefore, incumbent upon this Court to resolve the issue here and decide whether the immunity afforded to States by the Eleventh Amendment has been abrogated by the Jones Act. In the leading case of *Parden v. Terminal Railroad Co.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964), this Court initiated the principles that (1) when a State enters a field which is regulated by federal statute, and (2) Congress has specifically created a remedy in private parties for the violation of the applicable federal regulatory statute, and (3) that the parties can show that Congress expressly provided for the private remedy to be applicable to the States, then Eleventh Amendment immunity has been abrogated.

These announced principles were an extension of the decision in *Petty v. Tennessee-Missouri Bridge Comm.*, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959). Therein, the Supreme Court stated:

> There is no more apt illustration of the involvement of the commerce power and the power over maritime matters than the Jones Act . . . Finally, we can

find no more reason for excepting state or bi-state corporations from 'employer' as used in the Jones Act than we could for excepting them from the Safety Appliance Act (*United States v. California*, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567) or the Railway Labor Act (*California v. Taylor*, 353 U.S. 553, 77 S.Ct. 1037, 1 L.Ed.2d 1034). In the latter case, we reviewed at length federal legislation concerning employer-employee relationships and said, 'When Congress wished to exclude state employees, it expressly so provided.' 353 U.S. at 564. The Jones Act (46 U.S.C. Section 688) has no exceptions from the broad sweep of the words, 'any seaman who shall suffer personal injury in the course of his employment may', etc. The rationale of *United States v. California* (U.S.) supra, and *California v. Taylor* (U.S.) supra, makes it impossible for us to mark a distinction here and hold that this bi-state agency is not an employer under the Jones Act.

Petty, at pp. 282-83.

In the instant case, however, the Court of Appeals analyzed the post-*Petty* and post-*Parden* decisions and concluded that the announced principles of *Petty* and *Parden* are no longer viable.

> So in the space of four months, we have one decision of the Supreme Court upholding the power of Congress to abrogate State sovereignty with unequivocal language contained in the statute itself and another decision holding that State sovereignty under the Eleventh Amendment remains intact in the absence of unequivocal language contained within the relevant statute itself. The Court has established a bright line rule.
>
> Fifth Circuit opinion, at p. 2452.

In arriving at the majority opinion, the Court of Appeals relied upon *Employees of the Dept. of Public Health & Welfare v. Missouri Dept. of Public Health & Welfare*, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973),

Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), *County of Oneida, N.Y. v. Oneida Indian Nation of N.Y. State*, —— U.S. ——, 105 S.Ct. 1245, —— L.Ed.2d —— (1985), and *Atascadero State Hospital and California Department of Mental Health v. Douglas James Scanlon*, —— U.S. ——, 105 S.Ct. 3142, —— L.Ed.2d —— (1985) and *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. ——, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). In its analysis of the decisions expanding Eleventh Amendment immunity, the Court concludes that the admiralty and maritime sphere is but one more governmental function which can be proscribed by the Eleventh Amendment because Congress included no specific language in the Act itself. Regardless of the obvious competing interests between Petitioner's Jones Act rights versus Respondent's Eleventh Amendment immunity, the Court of Appeals concluded that the recent decisions do require Congressional language in the Jones Act in order to allow Welch to proceed with her claim. Thus, the decision of the majority emasculates the principles announced in the *Petty* and *Parden* decisions, notwithstanding that *Petty* and *Parden* have not been overruled by this Court. The instant case provides this Court with the opportunity to determine whether the expansion of Eleventh Amendment immunity extends to the admiralty and maritime jurisdiction on a clear and concise issue, and a writ of certiorari should, therefore, be granted.

Moreover, *Garcia v. San Antonio Metrpolitan Transit Authority*, 469 U.S. ——, 83 L.Ed.2d 1016, 105 S.Ct. 1005 (1985) does not compel one to conclude that the implied waiver principle of *Parden* is dead. Since the Jones Act was enacted pursuant to the plenary power afforded to Congress by Article III of the Constitution, one can readily conclude that admiralty and maritime matters remain within the exclusive jurisdiction of the federal government. Thus, the decision of the Fifth Cir-

cuit in this case effectively removes the State of Texas from the jurisdiction of Congress and has judicially carved an exception to the clear language of the Jones Act. By its decision, the Fifth Circuit has disenfranchised the Petitioner and those similarly situated from her Jones Act remedies.

At issue in *Atascadero, supra*, is whether the Rehabilitation Act, Section 504, overrides Eleventh Amendment immunity. While the Rehabilitation Act was enacted pursuant to the Fourteenth Amendment powers of Congress, and the requirements of *Pennhurst State School & Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) and *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 39 L.Ed.2d 358 (1979) have consistently been applied by this Court, there remains a significant distinction in the realm of employees federally protected by the Jones Act and the Federal Employers Liability Act. That distinction arises throughout the decisions of this Court and is most succinctly stated by Justice Brennan in his dissenting opinion in *Atascadero*:

> Admiralty was perhaps the most significant head of federal jurisdiction in the early nineteenth century. As Hamilton noted in a much-quoted passage from the Federalist Papers: 'The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes.' The Federalist No. 80, at 502 (Hamilton) (B. Wright ed. 1961). Although few admiralty cases could be expected to arise in which the states were defendants, the Marshall Court in the few instances in which it confronted the issue showed a strong reluctance to construe the Eleventh Amendment to interfere with the admiralty jurisdiction of the federal courts.
>
> *Atasacadero*, 105 S.Ct. 3142, at pp. 3172-73.

The Court should grant the petition for a writ of certiorari in this matter to resolve the issue of whether the Jones Act and (by reason of its incorporation into) the

Federal Employers Liability Act abrogate the Eleventh Amendment. To act otherwise places the state-employed Jones Act seaman in a "Bermuda Triangle" created not by legend, but by the judiciary.

CONCLUSION

Petitioner respectfully urges this Honorable Court to grant her Petition for Writ of Certiorari to the United States Court of Appeals to decide whether the Jones Act abrogates immunity granted to the States by the Eleventh Amendment.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-2253

JEAN E. WELCH,
Plaintiff-Appellant,

v.

STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION AND THE STATE OF TEXAS,
Defendants-Appellees,

DROTT MANUFACTURING COMPANY and
J.I. CASE COMPANY,
Defendants.

Filed January 22, 1986

OPINION

Before: Clark, Chief Judge, Brown, Gee, Rubin, Reavley, Politz, Randall, Tate, Johnson, Williams, Garwood, Jolly, Higginbotham, Davis and Hill, Circuit Judges.*

---

* Judge Edith H. Jones was not a member of the Court when this issue was submitted to the court en banc and did not participate in this decision.

Opinion by Judge Jerre S. Williams; Special Concurrence by Judge Gee, Circuit Judge; Special Concurrence by Judge Higginbotham, Circuit Judge, with whom Judges Garwood and Hill join; Dissent by Judge Brown, Circuit Judge, with whom Judges Rubin, Reavley, Politz, Tate, and Johnson join.

Appeal from the United States District Court
for the Southern District of Texas
George E. Cire, District Judge, Presiding

JERRE S. WILLIAMS, Circuit Judge:

Appellant Jean Welch was injured while working as a marine technician on the ferry landing dock at Galveston, Texas. Claiming under the Jones Act, 46 U.S.C. § 688, she sued her employer, the Texas Highway Department, and the State of Texas, for her injuries. In addition she also sued the manufacturer of the mobile crane which she alleges contributed to her injury.[1] Her Jones Act claim was dismissed by the district court on the assertion of sovereign immunity by the State of Texas and the Texas Highway Department, 533 F. Supp. 403 (S.D. Tex., 1982). A panel of this Court by a split decision reversed the decision of the district court, *Jean E. Welch v. State Dept. of Highways and Public Transportation and the State of Texas, Drott Mfg. Co. and J.I. Case Co.*, 739 F.2d 1034 (5th Cir. 1984). Rehearing en banc was granted, 739 F.2d 1046.

I.

The Highway Department of the State of Texas operates on a twenty-four hour basis a free automobile and

[1] Appellant's claim against the mobile crane manufacturer is not before us on this appeal.

passenger ferry between Point Bolivar and Galveston, Texas, across the waters which constitute the entrance to the Harbor of Houston, the third busiest port in the United States. The length of the ferry boat journey is approximately three miles from dock to dock. Without the ferry boat, a person wishing to travel from one area to the other by highway would have to drive approximately 130 miles. Appellant Welch was an employee of the Highway Department in the operation of the ferry. Her status as a "seaman" under the Jones Act is assumed and is not at issue. The State Highway Department was an insurer under the Texas Workers' Compensation Law, Texas Rev. Civ. Stat. Ann. art. 8306 et seq. (Vernon). Appellant, having been injured in the course of employment, clearly was entitled to compensation benefits under that law. She sued instead in federal court under the Jones Act for the full measure of damages to which injured seamen are entitled if they can prove negligence of their employer which caused the injury.

II.

The defense of the State, upon which it prevailed in the district court, is the defense of sovereign immunity under the Eleventh Amendment to the United States Constitution. While the Eleventh Amendment in terms only bars federal court jurisdiction in a suit by a citizen of one state against another state, the background under which the Amendment was adopted establishes a far broader foundation for the claim of sovereign immunity by the several states. It was assumed by the framers of the Constitution that the states could claim sovereign immunity not only in their own courts but in the federal courts. But, in 1793, the United States Supreme Court held in *Chisholm v. Georgia*, 2 Dall. 419, that the jurisdiction of the federal courts extended to a suit by the citizen of one state against another state as against a claim of sovereign immunity by the state. At the next

meeting of Congress following this decision the Eleventh Amendment was proposed; and it was quickly ratified.

While this is the only reference to sovereign immunity in the United States Constitution, it is established without question that the amendment simply broadened the sovereign immunity which already existed in the states as to its own courts. *United States v. Lee*, 106 U.S. 196, 207 (1882); *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890); *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

III.

The question raised by Welch bringing her Jones Act suit against her employer, the State of Texas, in federal court has been the subject of considerable doubt and confusion in the law. The starting point for the modern development of the law is *Parden v. Terminal R.R. Co.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964), in which the Supreme Court found a forced implied state waiver of sovereign immunity in Federal Employer's Liability Act claims. 45 U.S.C. §§ 51-60. The Court took the position that the state by operating for profit an interstate railroad as a common carrier, a federally regulated business, automatically waived its sovereign immunity. It is also clear that in terms the Jones Act remedies are based upon the Federal Employer's Liability Act. 46 U.S.C. § 688.

Of relevance also to the origins of the modern law of waiver of sovereign immunity by the states when the federal government is acting in the field of its plenary powers is a case which antedated the *Parden* case, *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 277, 70 S.Ct. 785, — L.Ed. — (1959). The Court held that the Jones Act applied to maritime employees of the bi-state commission. The Court then went on to hold that the agreement of the states of Tennessee and Missouri to set up the interstate bridge commission by means of

an interstate compact, which commission was given the authority to "sue-and-be-sued", constituted a waiver of sovereign immunity by the states to a Jones Act suit against the commission. For later developments in the law, as set out below, it is important to emphasize that in *Petty* the interstate compact under the Constitution had to be and was approved by the Congress. Congress had in terms, therefore, accepted the sue-and-be-sued clause as it related to the commission.

If the *Parden* case were to stand unlimited, it would dictate a reversal of the district court decision in this case and authorize Welch to bring her Jones Act suit in federal court. But the broad sweep of the *Parden* decision, although it has not been overruled, has overtly been limited by later decisions as its full implications have surfaced. *Employees of the Dept. of Public Health & Welfare v. Missouri Dept. of Public Health & Welfare* 411 U.S. 279, 286, 93 S.Ct. 1614, 1618, 34 L.Ed.2d 251 (1973), has regularly been cited by the Supreme Court following a citation of the *Parden* case because in the *Missouri Public Health & Welfare* case the Supreme Court modified *Parden* by holding that Congress must express itself in "clear language" to cause a private federal remedy for employees to be applicable to state employees.

A second case regularly cited by the Supreme Court is *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 2d 662 (1974), which relied upon the *Missouri Public Health & Welfare* case to find a lack of waiver by the state of its sovereign immunity as to citizen suits against the state under the Federal Aid to the Aged, Blind, or Disabled Program under the Social Security Act, 42 U.S.C. §§ 1381-1385. *See* Note, Reconciling Federalism and Individual Rights: The Burger Court's Treatment of Eleventh and Fourteenth Amendments, 68 Va. L. Rev. 865, 871 (1982).

On March 4, 1985, the Supreme Court in *County of Oneida, New York v. Oneida Indian Nation of New York State*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2 ——, cited *Parden*, *Missouri Public Health & Welfare*, and *Edelman* as establishing the Supreme Court's approach to congressional action forcing the states to yield their sovereign immunity otherwise existing under the Eleventh Amendment. The Court explicitly recognized that these cases involved "waiver [of sovereign immunity] for purposes of suit under a federal statute".

We relied upon the *Missouri Public Health & Welfare* case in *Intracoastal Transportation, Inc. v. Decatur County, Georgia*, 482 F.2d 361 (5th Cir. 1973), in finding the state had not impliedly waived its immunity against claims brought under the Bridge Act of 1906 simply by operating in a federally regulated sphere. "The private litigant must show that Congress *expressly* provided that the private remedy is applicable to the states." 482 F.2d at 365 (emphasis added). Again, in *Freimanis v. Sea-Land Service, Inc.*, 654 F.2d 1155, 1160 (5th Cir. 1981), we confirmed our decision in *Intracoastal* to find no forced implied waiver by the state in a private employee suit brought under the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 401.

If there had been any doubt that we have correctly viewed the later Supreme Court cases as limiting the *Parden* case, that doubt was effectively and completely removed by the decision of the United States Supreme Court in *Atascadero State Hospital & California Dept. of Mental Health v. Douglas James Scanlon*, —— U.S. ——, 105 S.Ct. 3142, —— L.Ed.2d —— (1985), decided June 28th of this year. The case involved suits by private litigants seeking monetary relief under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The state agencies moved for dismissal of the complaints on the ground the Eleventh Amendment barred the federal courts from entertaining respondents' claims. The claim

of sovereign immunity was accepted by the holding of the United States Supreme Court. The Court stressed that in its opinion in *Edelman v. Jordan*, *supra*, it had said that the state will be deemed to have waived its immunity "only where stated 'by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction' ", 415 U.S. at 673, quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909). The Court further said that even in the case of Fourteenth Amendment claims against the states, the Supreme Court in *Pennhurst v. State School & Hospital v. Halderman*, 465 U.S. 89 (1984), required "an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several states' ", quoting *Quern v. Jordan*, 440 U.S. 332, 342 (1979), and citing the *Missouri Public Health & Welfare* case.

The Court went on to state its own ruling in language even more specific. Justice Powell in his opinion for the Court said: "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear *in the language of the statute.* The fundamental nature of the interests implicated by the Eleventh Amendment dictates this conclusion." 105 S.Ct. 3147 (emphasis added). The Court then restated and explained this requirement by stressing that Congress' power to abrogate a state's immunity means that in those circumstances the usual constitutional balance between the state and federal government does not obtain and that it is therefore "incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment". Justice Powell then stated categorically: "The requirement that Congress unequivocally express its intention in the statutory language ensures such certainty." 105 S.Ct. 3148. Even more strongly in the next paragraphs the Court said "Congress

must express its intention to abrogate the Eleventh Amendment in unmistakable language *in the statute itself.*" 105 S.Ct. 3148 (emphasis added). Finally it should be noted that the opinion does not ignore the earlier *Parden* decision. It is cited along with the other later cases in a footnote appended to this final quotation from the opinion of the Court.

It would be difficult to make a legal principle more definitive than did Justice Powell writing for the Court in the *Atascadero* case. Congress can force the states to yield their sovereign immunity under the Eleventh Amendment only when it so states in clear language *within the statute itself.*

The other side of this constitutional principle was also set out by the Supreme Court in a decision on February 19th of this year. The case is *Garcia v. San Antonio Metropolitan Transit Authority,* —— U.S. ——, 105 S.Ct. 1005, —— L.Ed.2d —— (1985). That case held that the employees of the San Antonio Metropolitan Transit Authority were covered by and entitled to the protections of the minimum wage and overtime provisions of the Fair Labor Standards Act, and they could enforce their claims by suits brought by these governmental employees in federal and state courts. This holding was pursuant to a 1974 amendment to the FLSA under which Congress had in terms within the language of the statute itself extended its coverage to virtually all public employees of the states and their governmental entities. 29 U.S.C. § 203(e)(2)(C), (s)(6), and (x). So in the space of four months we have one decision of the Supreme Court upholding the power of Congress to abrogate state sovereignty with unequivocal language contained in the statute itself and another decision holding that state sovereignty under the Eleventh Amendment remains intact in the absence of unequivocal language contained within the relevant statute itself. The Court has established a bright line rule.[2]

This summary of the law conclusively establishes that Welch did not have the power to bring a Jones Act suit against the State of Texas in the federal court absent an express waiver of sovereign immunity by the State of Texas. Such a suit is barred by the Eleventh Amendment in the absence of specific congressional language contained within the statute itself requiring the abrogation of sovereign immunity. We should also emphasize that, as it is not now before us, we pretermit consideration of the question whether a state maritime employee can pursue a Jones Act claim in state court as against a state sovereign immunity assertion. In doing so we follow the pattern of the Supreme Court holdings in the cases establishing the law with respect to federal court suits. The Supreme Court also has not dealt with this issue.

IV.

Appellant urges that there has been an express waiver by the State of Texas of its sovereign immunity under

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[2] A current analysis by Professor Martha Field of the Harvard Law School is in full agreement. In a comprehensive article entitled *Garcia v. San Antonio Metropolitan Transit Authority*: The Demise of a Misguided Doctrine, 99 Harv. L. Rev. 84-118 (Nov. 1985). Professor Field evaluates the impact of *Atascadero* in these words:

> The Court last Term, for example, four months after the *Garcia* decision, ruled in *Atascadero State Hospital v. Scanlon* that Congress would not be deemed to have exercised its power to require states to defend in federal court against individuals' claims that the states are violating federal enactments, unless Congress has so stated in absolutely explicit language in the enactment itself. Because the Court imposed that condition retrospectively, it effectively placed upon Congress the burden of reenacting statutes regulating states if it would have states answer in federal court to individuals' suits.

In a footnote following this textual statement, Professor Field points out that in the analogous situation Congress did reenact the Fair Labor Standards Act to make it applicable to state employees.

the Texas Tort Claims Act. The Act does waive immunity to suit against the state for personal injuries proximately caused by the negligence of state employees acting within the scope of employment if the injury arises from "the operation or use of a motor driven vehicle and motor driven equipment." Texas Rev. Civ. Stat. Ann. art. 6252-19 § 3 (Vernon Supp. 1980-81). Appellant's injury did arise from the use of motor driven equipment by a state employee. Section 19 of the Act, however, limits this waiver of immunity. It provides that a governmental unit carrying Texas Workers' Compensation Insurance is entitled to the "privileges and immunities" granted by the Workers' Compensation Act "to private persons and corporations". The claim is made that since the State of Texas admittedly cannot insulate private employers from Jones Act and maritime remedies, *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed 143 (1953), granting the state agency "all of the privileges and immunities" constitutes an express waiver of sovereign immunity by the state under the Texas Workers' Compensation statute.

The short answer to this assertion is that it requires a tortured interpretation of the phrase "privileges and immunities" to find that those words constitute a waiver of the right of the state to limit suits by injured state employees in federal court. Instead, the obvious purpose of the statutory provision is to give to state agencies adopting Texas Workers' Compensation the protections against suits by injured employees for recovery of damages based upon negligence. If Texas had intended to withdraw its desire for coverage under the Texas Workers' Compensation Act by withdrawing the immunity in Jones Act cases, the granting of the "privileges and immunities" of the state Act was an exceedingly strange way to do it, and a much clearer way could have been found in simple language.

Of controlling importance in this case is recognition of the fact that once it is determined that Congress has

not required the state to waive its sovereign immunity by unequivocal language in the statute, the question of whether the state has or has not waived immunity from suits in the federal court is a matter of state law. If the state has spoken in interpreting its law, it is not within our authority to reinterpret the law. *See Petty v. Tennessee-Missouri Bridge Comm.*, 359 U.S. 275, 278, *supra*. We have the authoritative state interpretation of these very provisions. In *Lyons v. Texas A&M University*, 545 S.W.2d 56 (Tex. Civ. App. 1976), the precise issue of the case before us was decided by the Texas court. The case involved the injury of a seaman on a vessel owned and operated by Texas A&M University, a governmental unit of Texas. The Texas Workers' Compensation Act had been adopted by the University and was applicable to the injury. Lyons, however, brought suit to recover damages for unseaworthiness, maintenance and cure, and negligence under the Jones Act. The Texas Court of Civil Appeals affirmed the state district court in dismissing the claim. It found that section 19 of the Texas Tort Claims Act was intended to make the workers' compensation remedy exclusive. The Supreme Court of Texas denied review, finding no reversible error. Tex. Writs of Error Table, 134 (1982).

It is also noteworthy that the *Lyons* opinion was written by the late Judge Cire when he was serving on the Texas Court of Civil Appeals. Judge Cire was the United States District Judge who rendered the district court decision in the case which is before us. It strengthens the application of the state law for the district judge who applied it to have been the judge who created the authoritative state interpretation when he was on the state court. In any event, we give some deference to interpretations of state law by the district judges because of their particular knowledge of local law. *NCH Corp. v. Broyles*, 749 F.2d 247, 253 n.10 (5th Cir. 1985). Judge Cire knew what the law of the State of Texas was with respect to express waiver. We accept his interpretation.

We conclude that the State of Texas has not waived expressly its sovereign immunity beyond that contained in Section 19 of the statute which gives state employees coverage only under the Texas Workers' Compensation law if the agency has adopted that law.

Appellant makes a final analytical assertion that the State of Texas, by applying its own workers' compensation law to this injury of a maritime employee, has placed an unconstitutional condition upon its assertion of sovereign immunity. Reliance is grounded upon the Supreme Court case of *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917), which held that state workers' compensation statutes could not apply to injuries occurring on navigable waters.

Such an unconstitutional conditions analysis is not relevant here. The *Jensen* case did not concern itself with a maritime employee of a state. Instead, as must be emphasized throughout in the consideration of this and similar cases, the Court was dealing with private maritime employment. The analysis must be under the doctrine of sovereign immunity and the Eleventh Amendment. The established law is that the State of Texas, absent waiver, is not subject to suit in federal court under a statute passed as part of the federal plenary regulatory powers unless the federal government has expressly undertaken in terms within the statute to require waiver of immunity under that statute. This leaves the state free to provide workers' compensation for injuries to its own employees as against a suit in federal court. Otherwise, there would be a federally imposed remedy abrogating sovereign immunity without expressed intention to impose such a remedy. In terms this is inconsistent with *Atascadero* and also the principle of the political control of federal regulation by the states acting through the Congress which the Court emphasized in the *Garcia* case. 105 S.Ct. at 1018.

VI.

We hold that since Congress has not in terms within the Jones Act required waiver of state immunity as to the maritime employees of the states, and there has been no actual waiver by the state, the State of Texas was not subject to suit by an injured state maritime employee in federal court under the Jones Act. The decision of the district court denying Jones Act recovery to appellant, a maritime employee of the State of Texas, is in accordance with the law.

AFFIRMED.

THOMAS GIBBS GEE, Circuit Judge, specially concurring.

I concur in Judge Williams' careful opinion, writing separately only to confess an earlier error. Although, for the reasons given in my writing for the panel in this case at 739 F.2d 1034, I believe it was incorrectly reasoned, further reflection has convinced me that *Lyons v. Texas A&M University*, 545 S.W.2d 56 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd, n.r.e.) is an authoritative interpretation of state law by a Texas court, one which we are duty bound to follow. Under Texas practice, the notation "writ ref'd n.r.e." indicates that the Texas Supreme Court was not satisfied that the opinion of the intermediate appellate court correctly declared the law in all respects, but that no error was present that required reversal of its judgment. The *Lyons* opinion is therefore of a species that represents the most doubtful of Texas appellate authority. Nevertheless, it *is* Texas authority, and the holding in question was crucial to the judgment—which cannot have been correct if it was wrong. I therefore agree that we are bound by it.

PATRICK E. HIGGINBOTHAM, Circuit Judge, with whom Judges Garwood and Hill join, specially concurring:

I join the majority opinion but emphasize that the decision of the Supreme Court in *Scanlon* is but a specific application of a broader principle—one essential to the implementation of its concept that states must fight for their sovereignty in the political arena, as found in its *Garcia* holding.

The posed question is whether a seaman employed by the State of Texas is covered by the Jones Act. Its answer challenges our ability to write clear rules for deciding which federal statutory regulatory schemes include states. Ironically, our challenge is best met by passing it to the Congress through the familiar principle that we will not infer that legislation applies to the states. So the Court teaches, if in a subtle way, in *Garcia, Employees* and *Edelman* and now, more pointedly, in *Scanlon.*

The first inquiry, not addressed by the majority, is whether the federal statute applies to state operations at all. The concepts of federalism upon which *Garcia* assertedly rests require that we construe federal statutes to exclude states from their coverage unless Congress expressly indicates otherwise. If a federal statute does not recite its applicability to states, the inquiry should end. Only if a federal law explicitly governs state behavior do we reach the question of whether the Eleventh Amendment bars a private citizen from suing under the federal statute in federal court.

I

The core holding of *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985) is that Congress's power to impose its will upon the states is limited by the structural arrangement of our federal system,

rather than by ad hoc judicial line calls as to when federal legislation infringes upon "traditional" or "fundamental" state powers. The protections of state power built into the federal system, such as equal state representation in the Senate, are said to find their expression in the outcomes of political struggles, of political not judicial process. As the Court observed in *Garcia*, many federal statutes expressly exempt states from coverage, reflecting state success in the federal political arena. *See* 105 S.Ct. at 1019. Others, such as the Fair Labor Standards Act at issue in *Garcia*, expressly include states in their sweep. *See* 105 S.Ct. at 1008-09.

The more difficult question is when the courts should infer that Congress meant to subject states to federal regulation if a federal statute is by its terms applicable to a broad group such as "any seaman" or "any person," but makes no reference to states. In rejecting judicial refereeing and measures of the level of intrusion into state affairs by a federal statute, *Garcia* necessarily holds that the answer cannot be "sometimes." Being forced to deduce whether states have been brought within a federal statutory scheme based on the peculiar attributes of the scheme "inevitably invites an unelected federal judiciary to make decisions about which . . . policies it favors and which ones it dislikes." 105 S.Ct. at 1015.

But there is a more direct corollary of *Garcia:* federal statutes not expressly applicable to states are not. Although *Garcia's* specific holding extended FLSA coverage to public transit systems, the Court reaffirmed that "the States occupy a special and specific position in our constitutional system," 105 S.Ct. at 1020, and that there are "undoubtedly" limits on the federal power "to interfere with state functions . . . ." 105 S.Ct. at 1016. *Garcia* concludes that the primary limit on this power is the political process of state participation in federal decisionmaking. If this process is to have its force, legislation that is meant to affect states must say so; states will

then be aware of proposed federal legislation perceived to intrude into their operations, and will be able to draw their political weapons. But if legislation is silent or half-heartedly ambiguous as to its effect on states, and a court later declares that it applies to states, the process will have been skewed and the states will have been effectivly sandbagged. The result would be a sidestepping of the structural protections outlined in *Garcia* and a return of the judges from the sidelines.

Insistence on express articulation of Congressional purpose is not only internal to *Garcia*, but is a long-recognized safeguard of federalism. In *Parker v. Brown*, 317 U.S. 341, 351 (1943), the Supreme Court said:

> In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpected purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

The *Parker* Court applied this principle by holding that the Sherman Act did not apply to state conduct, even though that act purports to govern the behavior of all "persons." *See also Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666-68 (1979) ("white persons" referred to in 25 U.S.C. § 194 includes most artificial entities, but not states); *Weber v. Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 70 (1873) ("Statutes of limitation are not . . . held to embrace the State, unless she is designated, or necessarily included by the nature of the mischiefs to be remedied"). In addition, in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 24 (1981), the Court, construing the Developmentally Disabled Assistance and Bill of Rights Act, demanded that Congress "express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds."

The requirement of explicit statement has also long governed the applicability of federal statutes to the federal government. In *United States v. United Mine Workers*, 330 U.S. 258 (1947), the Court held that the Clayton and Norris-LaGuardia Acts' prohibition of suits by "employers" to enjoin strikes did not restrain the United States. The Court noted the "old and well-known rule that statutes which in general terms divest preexisting rights or privileges will not be applied to the sovereign without express words to that effect." *Id.* at 272; *see also United States v. Wittek*, 337 U.S. 346, 358-59 (1949); *United States v. Stevenson*, 215 U.S. 190, 197 (1909); *Dollar Savings Bank v. United States*, 86 U.S. (19 Wall.) 227, 239 (1873). Even when concerns of sovereignty are absent, the courts have insisted upon plain expressions of congressional purpose to highlight the line between congressional and judicial roles in other contexts, such as with the expressed reluctance to imply private rights of action according to needs perceived by courts. *See, e.g., Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979).

In short, were we writing on a clean slate, we ought unhesitatingly to apply the principle of express Congressional articulation to the Jones Act. That act covers "[a]ny seaman who shall suffer personal injury in the course of his employment. . . ." 46 U.S.C. § 688. If we insisted upon explicit Congressional statement the Jones Act would not apply to state employees.

Yet the slate is not clean. Most relevant here, it is marked by *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959). Like this case, *Petty* was a Jones Act suit by an injured employee of a state-operated ferry. The *Petty* court held that because Congress did not expressly *exempt* states from the operation of the Jones Act, states were Jones Act "employees." 359 U.S. at 282-83.

While *Garcia* must ultimately lead to the rejection of *Petty's* construing presumption, *Garcia* itself did not do so, because it construed a statute that expressly governs state workers. *Petty's* substantive reading of the Jones Act as covering state-employed seamen remains unquestioned in any other later Supreme Court case; the Court, rather, has chosen to distinguish *Petty* on its facts. *See Edelman*, 415 U.S. at 672. We cannot do the same here because our case involves the same statute and, indeed, virtually identical facts. Until the Court considers the Jones Act holding *Petty*, I concede, as I must, that it binds.

If a federal statute does not expressly include state operations, it is, under my view, properly read as inapplicable to states and no question of waiver of Eleventh Amendment immunity would be present. As far as the states are concerned, such a statute is identical to one that expressly exempts states. There is no federal right for state employees to lay claim to, and the state's invocation of its Eleventh Amendment immunity is not reached. Waiver of state immunity under the Eleventh Amendment would arise then only when the statute was expressly applicable to the states but silent or inexact with regard to the state's right to be free of suits by private citizens in federal court.

I concur in the majority's conclusion that Congress did not abrogate the immunity enjoyed by Texas under the Eleventh Amendment. In doing so, I reluctantly concur in its implicit conclusion that Jones Act seamen include employees of the state.

JOHN R. BROWN, Circuit Judge, with whom Judges Rubin, Reavley, Politz, Tate, and Johnson join, dissenting:

Because the opinion by Judge Williams for the Court treats two Supreme Court decisions as though they no

longer have any binding vitality and because those decisions command a determination (i) that the Jones Act applies to vessels owned or operated by a state; and, (ii) that the abrogation of Eleventh Amendment [1] immunity which is clearly established for FELA cases, is necessarily extended to the Jones Act, which incorporates FELA, I must dissent.

As is obvious from what I believe to be the important questions, the answer is one of Congress' constitutional power and how it has been exercised. To my way of thinking, the crucial point is whether Congress has abrogated state immunity to suit, not whether there has been a waiver on the part of Texas, a maritime employer.[2] Unlike the majority, I do not see waiver as relevant.[3] It is my opinion that the Supreme Court has ruled that the FELA abrogates state Eleventh Amendment immunity. In the Jones Act case before us, involving the same statute, we cannot hold differently.

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[1] The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

[2] Much of the confusion in Eleventh Amendment jurisprudence derives from courts' casual use of the terms waiver, consent, and abrogation. Actually, these terms represent distinct concepts and the difference between them is crucial for a correct understanding of the case before us. Waiver or consent concerns a state's acquiescence, either expressly or impliedly; abrogation deals with congressional action.

[3] The majority concludes that waiver is applicable only to suits brought by private citizens. With this I have no disagreement. The opinion also concludes that a state's refusal to waive has broader implications than just barring suits in federal court. Regardless of the merits of this analysis, I believe it has no application to the case before us because the Jones Act, passed pursuant to Congress' plenary admiralty power has been held to include the states.

I. Admiralty Supreme

My view is that Article III of the Constitution gives Congress plenary power over admiralty and maritime matters. Our framers did this for a very understandable reason. Almost all commerce at the time of our nation's founding was water borne. In order to allow for the free flow of trade across occasionally jealous and protectionist state boundaries, the delegates meeting in Philadelphia made Congress the custodian of power over both interstate commerce and admiralty. Moreover, the Constitution makes a distinction between its grant to Congress of power over interstate commerce and its allocation to the federal government of exclusive jurisdiction over admiralty. As I see it, this distinction in phraseology was deliberate then, and is of crucial significance now. It is crucial because Congress is given a special interest in maintaining the uniformity of admiralty and has exercised its plenary power over maritime matters in enacting the Jones Act. In doing so,

> [T]heir purpose was not to strike down or abrogate the system, but to place the entire subject—its substantive as well as its procedural features—under national control because of it intimate relations to navigation and to interstate and foreign commerce.

Panama Railroad Co. v. Johnson, 264 U.S. 375, 386, 44 S.Ct. 391, 393, 68 L.Ed. 748, — (1924).

In exercising its exclusive power over admiralty, Congress chose expressly to make the provisions of the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51 *et seq.*, an integral part of the Jones Act. If there was any question about this incorporation from the statutory language or legislative history of the Jones Act, a long line of Supreme Court decisions has removed all doubt.[4]

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[4] Indeed, the Supreme Court in *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 44 S.Ct. 391, 68 L.Ed. 748 (1924), considered the

Since this incorporation has been determined to be constitutional, the question for us to resolve is whether there is any collision between Congress' plenary admiralty power and the Eleventh Amendment. My view is that the framers' interest in the uniformity of admiralty—revealed in the almost unquestioned delegation of power over admiralty matters to the United States government with little dissent even on the part of the antifederalists—mandates the conclusion that Texas, as maritime employer, is subject to the Jones Act.

A remaining consideration then is whether the Eleventh Amendment, under the interpretations given it by the Supreme Court that extend its scope beyond the face of its language, bars federal court proceedings.

This dissent is divided into the following analytical framework: Part II discusses the plenary nature of the admiralty power granted to Congress by the Constitution. Part III deals with the Jones Act, its incorporation of the FELA, and its abrogation of state immunity. Part IV then considers the Supreme Court's recent pronouncements on federalism in *Garcia* and *Atascadero*.

II. Congress' Admiralty Power is Plenary

As the Jones Act begins with Article III, Section 2 of the Constitution, so do I. This article extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction". In addition, Article I, Section 8, confers upon Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other

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Jones Act's incorporation of the FELA in an attack upon the Jones Act's constitutionality. The court said:

> [c]riticism is made of the statute because it does not set forth the new rules but merely adopts them by a generic reference. But the criticism is without merit. The reference . . . is a recognized mode of incorporating one statute or system of statutes into another, and serves to bring into the latter all that is fairly covered by the reference.

powers vested by this Constitution in the government of the United States or in any department or offices thereof." In *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215, 37 S.Ct. 524, 61 L.Ed. 1086 (1917), the Supreme Court stated "it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country." As the Court emphasized, the original Judiciary Act of 1789 gave district courts of the United States "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." [5] *Id.* at 215.

In *Workman v. Mayor, Alderman, and City of New York*, 179 U.S. 553, 560, 21 S.Ct. 212, 45 L.Ed. 314 (1900), the Court made clear that the framers desired uniformity in maritime jurisprudence; accordingly, they assigned the admiralty power exclusively to Congress:

> [i]t would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports, if they sustained damages by the negligence of those who have management of the docks, they will be entitled to compensation, and in others they will not; such a distinction arising, not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by whom the docks are managed.

See aso Ex Parte Garnett, 141 U.S. 1, 13, 11 S.Ct. 840, 35 L.Ed. 631 (1891).[6]

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[5] Today in 28 U.S.C. § 1331(1), Congress has vested in federal district courts original and exclusive jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases other remedies to which they are entitled."

[6] The *Garnett* Court stated: "[t]he Constitution must have referred to a system of law co-extensive with, and operating uniformly

The Supreme Court has long held that the Constitution empowered Congress to legislate exclusively over matters within the admiralty and maritime jurisdiction.[7] As the Supreme Court stated in *Knickerbocker Ice Co. v. Stwart*, 253 U.S. 149, 156, 40 S.Ct. 438, 64 L.Ed. 834, 838 (1920), "the necessary consequence [of any other conclusion] would be destruction of the very uniformity in respect of maritime matters which the Constitution was designed to establish." The Constitution

> took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law, or to interfere with its proper harmony and uniformity in its international and interstate relations.

Id. at 160. In *Knickerbocker* the Court also recognized, and chose to emphasize, tht Congress' admiralty power was much greater than its power to regulate interstate commerce. "The distinction between the indicated situation created by the Constitution relative to maritime af-

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in, the whole country. *It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed* on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states." *Id.* (emphasis added).

[7] In *State of Washington v. Dawson & Co.*, 264 U.S. 219, 224, 44 S.Ct. 302, 68 L.Ed. 646 (1924), the Supreme Court said "well established in the rule that state statutes may not contravene an applicable act of Congress, or affect the general maritime law. . . . No such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works a material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself."

fairs and the one resulting from the mere grant of power to regulate commerce, without more, should not be forgotten." *Id.* at 160.[8]

Thus, the plenary power of Congress over admiralty has long been upheld.[9] It is more extensive than Congress' power over interstate commerce. If, however, Congress neglects to expressly include the states within the scope of a maritime enactment—as it did in passing the Jones Act—there remains the question of whether the statute applies to the states. Our inquiry must focus on the congressional abrogation of state immunity under the Jones Act; if abrogation is found, the Eleventh Amendment does not forbid suit in federal court.

III. The Jones Act Abrogates State Immunity to Suit

The Jones Act provides that:

> *any seaman* who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action *all statutes of the United States modifying or extending the common law right or remedy in case of personal injury to railroad employees shall apply*; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. *Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his princial office is located.*

46 U.S.C. § 688 (emphasis added).

The FELA, incorporated by the Jones Act, provides in part:

> [e]*very common carrier* by railroad while engaging in commerce between any of the several states . . . *shall be liable* in damages *to any person* suffering injury while he is *employed by any such carrier* in such commerce . . . [and that] [under this chapter an *action may be brought in a district court of the United States*. . . .

45 U.S.C. §§ 51, 56 (emphasis added). In *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 44 S.Ct. 391, 68 L.Ed. 748 (1924), the Supreme Court expressly held that the Jones Act was enacted pursuant to Congress' admiralty powers. *See also Engel v. Davenport*, 271 U.S. 33, 46 S.Ct. 410, 70 L.Ed. 831 (1926); *Kendell v. United States*, 37 U.S. 524 (12 Pet. 542), 9 L.Ed. 1181 (1838); In re Health, 144 U.S. 92, 12 S.Ct. 615, 36 L.Ed. 358 (1892). The extent to which Congress forbade any limitation, restriction, or reduction of these rights is reflected in § 55 of FELA:

[8] As a further demonstration of Congress' plenary power over admiralty matters, consider the Admiralty Jurisdiction Extension Act. This Act, which extends the reach of the admiralty courts beyond what was commonly accepted as a limit on their power, has been held constitutional as against contentions that it was an unauthorized congressional extension of admiralty and maritime jurisdiction. *See United States v. Matson Navigation Co.*, 201 F.2d 610 (9th Cir. 1953); *Pure Oil Co. v. Snipes*, 291 F.2d 60 (5th Cir. 1961); *Gutierrez v. Waterman SS Corp.*, 373 U.S 206, 83 S.Ct. 1185, 10 L.Ed.2d 297 (1963), *rehearing denied*, 374 U.S. 858, 83 S.Ct. 1863, 10 L.Ed.2d 1082 (1963); *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 92 S.Ct. 418, 30 L.Ed.2d 383 (1971), *rehearing denied*, 404 U.S. 1064, 92 S.Ct. 731, 30 L.Ed.2d 753 (1972); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 56 (2d Cir. 1976), *aff'd, Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977).

[9] In Ex Parte Garnett, 141 U.S. 1, 14, 11 S.Ct. 840, 35 L.Ed. 631 (1891), the Court said "the Constitution extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction,' and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the National Legislature, and not in the State Legislature."

> Any contract, rule, regulation, or device whatsoever, the purpose of intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void.

45 U.S.C. § 55. This broad, remedial statute provides a remedy to *all seamen*; thus, I now turn to consider whether this exercise of plenary authority over admiralty is on a collision course with the Eleventh Amendment when it is invoked to provide a remedy for a state-employed seaman.

Petty is Decisive
Jones Act Applies to States

There is no question whether the Jones Act applies to state-operated vessels. That has already been authoritatively determined by the Supreme Court's decision in *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959). In *Petty*, the Supreme Court declared that the states of Tennessee and Missouri were subject to the Jones Act by their operation of a ferry.

> [W]e can find no more reason for excepting state or bi-state corporations from 'employer' as used in the Jones Act than we could for excepting them either from the Safety Appliance Act (*United States v. California*, 297 U.S. 175, 80 L.Ed. 567, 56 S.Ct. 421) or the Railway Labor Act (*California v. Taylor*, 353 U.S. 553, 1 L.Ed.2d 1034, 77 S.Ct. 1037). In the latter case we reviewed at length federal legislation governing employer-employee relationships and said, "When Congress wished to exclude state employees, it expressly so provided." 353 U.S. at 564. The Jones Act (46 U.S.C. § 688) has no exceptions from the broad sweep of the words "Any seaman who shall suffer personal injury in the course of his employment may" etc. The rationale of *United States v. California* and *California v. Taylor* makes it impossible for us to mark a distinction here and hold that this bi-state agency is not an employer under the Jones Act.

Id. at 282-83.

It bears emphasis that although the compact power and the states' acceptance of Congress' conditions were significant for the majority's decision in *Petty* on the Eleventh Amendment, the Court was essentially unanimous on the clear holding that the Jones Act applied to the states. Adding universality to the term "any seaman" in the Jones Act is the Court's observation that "[t]here is no more apt illustration of the involvement of the commerce power and the power over maritime matters than the Jones Act." *Id.* at 281.

Parden is the Answer

Within five years of *Petty's* determination that the Jones Act applies to state-operated vessels, *Parden v. Terminal Railway Co.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964), held that FELA was effective to abrogate Eleventh Amendment immunity for a state-operated, interstate railway. *Parden* is still the law. It has yet to be overturned, and its constant citation[10] is living proof that it is still alive, well and controlling.

Although some of the Supreme Court's language in *Parden* speaks in terms of a "waiver" by Alabama of its immunity to suit, I firmly believe that *Parden* stands for Congress' abrogation of the states' Eleventh Amendment immunity in FELA. The essential principle of *Parden* is that "when a state leaves the sphere that is exclusively

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[10] As recently as the preceding term, the Supreme Court has cited *Parden* as a precedent controlling its decisions on Eleventh Amendment immunity. *See County of Oneida, New York v. Oneida Indian Nation*, —— U.S. ——, —— L.Ed.2d ——, —— S.Ct. ——, 53 U.S.L.Wk. 4225, 4232 n.26 (1985).

its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation." *Id.* at 196. This is shown convincingly from the structure of the Court's reasoning. The Court said:

> By adopting and ratifying the Commerce Clause, the states empowered Congress to create such a right of action against interstate railroads; by enacting the FELA in the exercise of this power, Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus consented to suit.

Id. at 192. While the Court speaks occasionally in terms of waiver, its rationale is really one of the exercise of constitutional power.[11] Any talk of waiver was purely

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[11] In *Peel v. Florida Department of Transportation*, 600 F.2d 1070, 1080-81 (5th Cir. 1979), we said:

> [a] more consistent rationale is that a state can consent to private damage actions when *Congress* manifests a sufficient purpose to abrogate a state's immunity. Under this approach, the state waived its immunity from suit in federal court at the same time it surrendered its sovereign immunity and gave Congress the power to legislate under delegated powers. As recognized by Chief Justice Hughes in an early case involving sovereign immunity. "States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'" *Monaco v. Mississippi*, 292 U.S. 313, 322-23, 54 S.Ct. 745, 748, 78 L.Ed. 1282 (1934) (quoting The Federalist No. 81) (A. Hamilton footnote omitted). This rationale removes the Eleventh Amendment as a bar whenever Congress validly has exercised its powers.
>
> > [I]n exercising her rights, a state cannot disregard the limitations which the federal constitution has applied to her power. Her rights do not reach to that extent. Nor

a palliative for holding states subject to the act of Congress. A spoonful of sugar always helps the medicine go down. Indeed, in its discussion of the palliative nature of waiver, the *Parden* Court reveals that congressional power—not consent or acquiescence by Alabama—is what is at stake because otherwise "the congressional power to condition such an act upon amenability to suit would be meaningless if the state, on the basis of its own law or intention, could conclusively deny the waiver and shake off the condition." *Id.* at 196.

Thus, the allusions to waiver, despite later efforts to structure or depecit them as such, are by no means the Court's basis for holding Alabama liable in *Parden*. This can be seen from the way in which the Court stated the issue:

> Here, for the first time in this court, a state's claim of immunity against suit by an individual meets a suit brought upon a cause of action expressly created by Congress. Two questions are thus presented (1) did Congress in enacting the FELA intend to subject a state to suit in these circumstances? (2) did it have the power to do so, as against the state's claim of immunity?

Id. at 187. As *Parden* said of the FELA—in language swallowed up hook, line, and sinker by the Jones Act:

> *We think that Congress, in making the FELA applicable to 'every common carrier* by railroad in in-

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> can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of the rights she would have if those power had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of governmental powers of the states. It is carved out of them.

Peel at 1080-81, *quoting Fitzpatrick v. Bitzer*, 427 U.S. 445, 454-55, 96 S.Ct. 2666, 2670-71, 49 L.Ed.2d 614 (1976), *quoting* Ex Parte Virginia, 100 U.S. 339, 346-48, 26 L.Ed. 676 (1880).

terstate commerce *meant what it said.* The congressional statutes regulating railroads in interstate commerce apply to such railroads, *whether they are state owned or privately owned* is hardly a novel proposition; it has twice been clearly affirmed by this court.

Id. at 187-88 (emphasis added).

In *Parden*, of course, the Court was speaking of Congress' power under the commerce clause. It found that an exercise of pure power on the part of Congress was sufficient to abrogate the states' immunity. The states had ceded to Congress, for the national good that uniformity would bring, that portion of their sovereignty dealing with the power to regulate interstate commerce. In the Court's view, the decision to regulate employers of interstate railway workers, be they private parties or state government, was for Congress alone.

> While a state's immunity from suit by a citizen without its consent has been said to be rooted in the 'inherent nature of sovereignty,' the states surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.
>
> If Congress made the judgment that, in view of the dangers of railroad work and the difficulty of recovering for personal injuries under existing rules, railroad workers in interstate commerce should be provided with the right of action created by the FELA, we should not presume to say, in the absence of express provision to the contrary, that it intended to exclude a particular group of such workers from the benefits conferred by the Act.

Id. at 191 (citations omitted).

In language about the commerce power which rings even truer about Congress' power over admiralty, the *Parden* Court said:

> This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the Constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects is plenary as to those objects, the power over commerce within foreign states, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. *Gibbons v. Ogden*, 9 Wheat 1, 196-97, 6 L.Ed. 23, 70 (1824).

Id. at 191.

The admiralty power is more extensive than the commerce power, in the sense of the states' inability to infringe upon admiralty's national uniformity. The Jones Act, an exercise of this broad, plenary power, by its very terms incorporates the FELA which the Supreme Court holds abrogates a state's Eleventh Amendment immunity. In light of these observations, *Parden*, which abolished state immunity for state railroad employees covered by the FELA, must do the same for state seamen because their rights come from the same statute. "By engaging in the railroad business a state cannot withdraw the railroad from the power of the federal government to regulate commerce." *New York v. United States*, 326 U.S. 572, 582, 66 S.Ct. 310, 90 L.Ed. 326, 333 (1946). Similarly, by operating a ferry, the State of Texas cannot remove the ship or the seamen on her from the power of the federal government to regulate maritime activities. *See Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 73 L.Ed.2d 300, 306, 102 S.Ct. 2654 (1982).

Fifth Circuit Bridge Act Cases Inconsequential

The importance of Congress providing a private cause of action as evidence of an intent to abrogate the states'

immunity to suit is nicely shown in reverse by our cases considering the Bridge Act: *Intracoastal Transportation v. Decature County, Georgia*, 482 F.2d 361 (5th Cir. 1973), and *Freimanis v. Sea-Land Service*, 654 F.2d 1155 (5th Cir. 1981). In *Intracoastal* we concluded that the "Bridge Act of 1906 does not create a cause of action in private parties"; consequently, we sustained a state's claim to immunity. Similarly, in *Freimanis* we focused on the lack of a private remedy for violations of the Rivers and Harbors Appropriation Act of 1899. We specifically juxtaposed Congress' lack of intention to give a private cause of action in these Acts with Congress' clear intention to sanction private action in the FELA.

> Congress in exercising this regulatory authority over navigation did not, as it had in the Federal Employers' Liability Act, create any civil cause of action in favor of private parties injured by any violation of the Act. Rather, it chose to achieve its regulatory purposes through specific penal statutes.

Id. at 1160, *quoting Red Star Towing v. Department of Transportation of New Jersey*, 423 F.2d 104, 105-06 (3d Cir. 1970). Thus, in contradistinction to the Jones Act and its incorporation of the FELA,

> the presently relevant statute regulating the bridging of navigable streams does not confer any new civil remedy upon private parties and thus cannot by logical inference be read as intended to impose equivalent civil liability upon an otherwise immune state.

Red Star Towing, 423 F.2d at 106.

Parden is Still Alive

The majority suggests—if it does not squarely hold—that *Parden* has been significantly limited by the Supreme Court in *Employees v. Dept. of Public Health*, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973), and in *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). In note 1 of *Employees* the majority states that *Parden* was premised on the conclusion that Alabama, by operating the railroad, had consented to suit in the federal courts under the FELA. I simply do not subscribe to this view. I believe that the essential principle of *Parden*—state liability to federal suit when Congress acts pursuant to a plenary power—remains unaffectd by *Employees* and *Edelman*, and I now consider the very different situations before the Court in the two cases.

The Court in *Employees* stated that *Parden* concerned only a rather isolated state activity, whereas *Employees* dealt potentially with all office workers in the state government of Missouri. Most importantly, *Employees* concerned the application of the Fair Labor Standards Act (FLSA). By the very terms of the original FLSA, states were exempted from coverage. Confusion arose because of a later congressional amendment that concerned state hospital employees. The Court decided that it would:

> be surprising in the present case to infer that Congress deprived Missouri of her constitutional immunity without changing the old § 16(b) under which she could not be sued or indicating in some way by clear language that the constitutional immunity was swept away.

Employees at 285.

In *Employees* the Court merely declined "to extend *Parden* to cover every exercise by Congress of its commerce power, where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the states and putting the states on the same footing as other employers is not clear." *Id.* at 286-87. Thus, the Court refused to find abrogation of state immunity because there was a confusing expression on the part of Congress. First the FLSA had clearly exempted states;

a later amendment then introduced confusion. There is no such confusion with the Jones Act or the FELA. It has long been established that the FELA includes *every* employer and gives *every* employee of an interstate railroad a cause of action.

Indeed, using the Supreme Court's own method of distinguishing *Employees* from *Parden*, we have in the case before us only the isolated activity of operating a ferry. This activity is the equivalent of the operation of a railroad in interstate commerce through the Jones Act's incorporation of FELA. It is not the widespread type of intrusion upon all governmental functions of the states that would have resulted from extending FLSA in *Employees*. In *Employees*, the Court's reluctance to find the necessary intention to include the states within the FLSA was influenced by Congress' confusing amendments. This confusion, as the Supreme Court held, showed a lack of congressional intention to abrogate the states' immunity.

The next case setting out the Supreme Court's approach to the Eleventh Amendment and state immunity is *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). The Court in *Edelman* examined Aid to the Aged, Blind, or Disabled (AABD), a federal program funded by the state and federal governments, and administered by state officials. *Edelman* had to deal with both *Parden* and *Employees*. The Court, emphasizing the critical significance of abrogation and the absence of a private right of action, said:

> the question of waiver or consent under the Eleventh Amendment was found in those cases to turn on *whether Congress had intended to abrogate the immunity* in question, and whether the state by its participation in the program authorized by Congress had in effect consented to the abrogation of this immunity.
>
> *But in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes states is wholly absent.* Thus, respondent is not only precluded from relying on this court's holding in *Employees*, but on this court's holding in *Parden* and *Petty* as well. (emphasis added).

Edelman at 672.

Thus, in *Edelman*, a class action seeking declaratory and injunctive relief against state administrators, the Court applied an analysis to the AABD which lends support to my view that *Parden* was not limited by *Employees*. The Court's language indicates that its note one in *Employees* was an overly broad attempt to distinguish *Parden* because, unlike the *Employees* note, *Edelman* says *Parden* was founded on Congressional intend—and power—to abrogate state immunity by creating a private cause of action.[12] Further, *Edelman* uses the same analysis to distinguish *Employees* which I maintain distinguishes *Employees* from *Parden*: that is, *Edelman* read *Employees* as a case which focused on the confusion Congress created in the FLSA by first exempting the states, then trying to include part of their workers.

As I have stated, there has never been any confusion about the Jones Act's incorporation of the FELA's clear language and its binding application to state operated vessels; and FELA has long been held to apply to the states and to abrogate their Eleventh Amendment immunity to suit in federal court. When it is understood that *Edelman* was concerned only with state participation in a program through which the federal government provided assistance for the state's operation of a system of public aid, it comes as no surprise that the Eleventh Amendment was held to be a bar to suit in federal court. In grant-in-aid programs, the principle of state court adjudication is clear unless Congress expressly indicates

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[12] The *Edelman* Court said: "*Parden* . . . involved a congressional enactment which by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included states. . . ." *Id.* at 672.

that the program allows suit in federal court. But the *Edelman* Court's discussion of waiver places no restriction upon *Parden's* holding that FELA abrogates state immunity to suit.[13]

IV. The Rationales of Garcia & Atascadero *Support the Jones Act Abrogation of the State's Eleventh Amendment Immunity*

The recent pronouncements of the Supreme Court in its continuing exegesis of the role of the several states in the federal system are reminiscent of Doctor Doolittle's two-headed llama, the Pushmi-Pullyu.[14] Since the case before was argued, the Supreme Court has handed down *Garcia* [15] and *Atascadero.*[16] I confront *Garcia* because of its focus upon the structure of our federal system. I must similarly confront *Atascadero* because of the sweeping language which the Court used in interpreting the scope of the Eleventh Amendment. While it is my opinion that on the facts before us *Parden* and *Petty* establish Texas' liability to federal suit under the Jones Act because the Supreme Court has never disturbed their holdings, I also believe that, properly understood, *Garcia* and *Atascadero* do not detract from my conclusion that the Jones Act effectively abrogates Texas' Eleventh Amendment immunity.

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[13] Thus, the *Edelman* Court said the "mere fact that a state participates in a program through which the federal government provides assistance for the operation by the state of a system of public aid is not sufficient to establish consent on the part of the state to be sued in the federal courts." *Id.* at 674. It is with the distinction between waiver and abrogation in mind that *Edelman* said of grant-in-aid programs:

> constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a state has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated by the most express language or by such overwhelming implication from the test as [will] leave no room for any other reasonable constructions. (citations omitted).

Id. at 673.

[14] A pushmi-pullyu is the rarest of all creatures. It is a most unusual creature, having two heads—one at either end of its body. As a consequence of the different perspectives offered to either head, a pushmi-pullyu is engaged in a contant tug of war with itself. It moves first this way, then that—but never does it move very far in either direction. *See* Lofting, "The Story of Doctor Doolittle" in *Anthology of Children's Literature*, 624 (4th ed. 1970).

[15] *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. ——, 83 L.Ed.2d 1016, 105 S.Ct. 1005 (1985).

[16] *Atascadero State Hospital v. Scanlon*, 473 U.S. ——, 87 L.Ed.2d 171, 105 S.Ct. —— (1985).

The significance of *Garcia* is its focus upon the political process as the best way for the states to protect themselves from unduly broad regulation by the federal government in our federal system. *Garcia* is an important case not only for what it says, but for the posture in which the decision comes down. It stands for the proposition that states must fight for their sovereignty in the political arena. In essence, the water-mark for state sovereignty was illustrated by *National League of Cities,*[17] concern for the integrity of traditional governmental functions and by *Pennhursts's* [18] concern for "clear statements" in grant-in-aid programs.

Now, however, the Court has handed down *Garcia* in its repudiation of its decision in *National League of Cities.* I believe *Garcia* reaffirms the principles of *Parden.* When Congress acts pursuant to a plenary power—one unrestrained within its constitutionally delegated bounds —the states must be affirmatively exempted through the political process if they are to escape inclusion within a regulatory scheme in an area where national uniformity is important.

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[17] *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976).

[18] *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 79 L.Ed.2d 67, 104 S.Ct. 900 (1984).

In *Garcia*, the Supreme Court looked to the political process, not the judicial process, for the states' power to protect themselves from excessive congressional regulation. This requires an affirmative act on the part of Congress to exclude states from the reach of its plenary power—in holding otherwise, the majority risks attributing to Congress the now judicially discredited distinctions between traditional state governmental and nongovernmental functions. *Garcia* clearly rejected this method of analysis which has been generated by *National League of Cities*. Accordingly, is is for Congress, influenced by state involvement in the legislative process, to restrain itself in the exercise of its plenary powers to the proper amount of congressional regulation of the states. Any other reading violates *Garcia*'s clear command that federal judges should not intrude into the political process.[19]

Garcia, which did not even involve the Eleventh Amendment, cannot be forced into the express reference mold. Its focus upon the political process to protect the states is federalism as reflected by *Parden* and *Petty*, not the federalism of *National League of Cities*.

The holding of *Garcia* was:

> We perceive nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision. SAMTA faces nothing more than the same minimum wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet.

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[19] Certainly Justice Powell in his dissent in *Garcia* interpreted the majority opinion in this fashion. Indeed, what Justice Powell found most troubling was the majority's conclusion "that federal political officials, invoking the Commerce Clause, are the sole judges of the limits of their own power." *Garcia*, 83 L.Ed.2d at 1044. (Powell, J., dissenting).

Id. at 1036. The rationale behind the Court's conclusion that a state governmental agency was subject to the FLSA was that the states must protect themselves by participation in the political process. Indeed, the Court observed that "the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the states will not be promulgated." *Id.* at 1037.[20]

Garcia stands for the proposition that states retain sovereign authority "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the federal government." *Garcia* at 1033. The admiralty power, like that over commerce, was expressly delegated to the national government by the Constitution. *Garcia* makes clear that federal legislation constitutionally may apply to state activities. In doing so, it restores full force to the Court's earlier decisions in *Parden* and *Petty*. Therefore, the constitutional power rationale that *Parden* applied to uphold FELA's application to the states as an employer still stands.[21]

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[20] The emphasis upon the states' ability to protect themselves by their involvement in the legislative process explains the *Garcia* Court's statement in note 10 that:

> the existence *vel non* of a tradition of *federal* involvement in a particular area does not provide an adequate standard for state immunity. . . . The recent vintage of this regulatory activity does not diminish the strength of the federal interest in applying regulatory standards to state activities, nor does it affect the strength of the state's interest in being free from federal supervision.

Id. at 1030.

[21] Justice Powell recognized this—even though he disagreed with the conclusion—when he observed: "[t]he Court apparently thinks that the states' success at obtaining federal funds for various projects and exemptions from the obligations of some federal stat-

The Court, supporting its conclusion that "our federalism" requires that the states affirmatively exempt themselves from federal regulation, listed many of the federal regulatory schemes which specifically exempt the states and their subdivisions. Conspicious by their absence from the Court's partial catalogue are the two statutes at issue in this case: FELA and the Jones Act. Most important for a correct understanding of *Garcia*, however, is that the court chose as its illustration those programs which specifically exempted the states from regulation. In matters within its plenary power—admiralty and commerce—Congress is not required to expressly incorporate the states within the regulatory scheme. The states are already on notice of Congressional authority in those areas because it results from the states' own constitutional cession of power over them to the federal government.

In the context of a plenary power the message of *Garcia* is that Congress intends to act to the full extent of its power—unless it places some limitation upon its own actions. The fact that Congress in the past may not have exercised its delegated power to their full extent is not sufficient reason to adopt the express articulation doctrine. *Garcia* has not mandated such a course, and I do not believe *Atascadero* compels a different result.

Atascadero is a case which arose under the Rehabilitation Act of 1973, an anti-discrimination statute enacted pursuant to the power granted to Congress by the Fourteenth Amendment. In a sweeping opinion for a divided court, Justice Powell wrote

> in determining whether Congress in exercising *its Fourteenth Amendment powers* has abrogated the States' Eleventh Amendment immunity, we have required *an unequivocal expression of Congressional intent to overturn* the constitutionally guaranteed immunity of the several states.[22]

utes is indicative of the effectiveness of the federal political process in preserving the states' interests. . . ." *Garcia*, 83 L.Ed.2d at 1043 (Powell, J. dissenting).

Atascadero, —— U.S. at ——, 87 L.Ed.2d at 178, —— S.Ct. at ——, *citing Pennhurst State School & Hospital v. Halderman*, 456 U.S. 89, 79 L.E.2d 67, 104 S.Ct. 900 (1984) (emphasis added). I believe, however, that *Atascadero* by the use of the very words refers to the extent of state Eleventh Amendemnt immunity when considering congressional acts under the Fourteenth Amendment.[23]

[22] The majority places great store on a recent law review article by Professor Martha Field of Harvard Law School, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 Harv. L. Rev. 84 (1985), which suggests that the holding of *Atascadero*

> "effectively placed upon Congress the burden of reenacting statutes regulating states if it would have states answer in federal courts to individuals' suits".

Id. at 115. However, nothing in the article—and certainly nothing in *Atascadero* itself—requires the reenactment of statutes *already interpreted* as having abrogated the Eleventh Amendment immunity of the states.

As I emphasized earlier, both FELA and the Jones Act have already been determined to abrogate state immunity to suit. *See supra* Part III.

[23] The Court repeatedly makes this clear.

> As a result, when acting pursuant to § 5 of the Fourteenth Amendment, Congress can abrogate the Eleventh Amendment without the state's consent. 87 L.Ed.2d at 177.
>
> Likewise, in determining whether Congress in exercising its Fourteenth Amendment powers has abrogated the State's Eleventh Amendment immunity, we have required "an unequivocal expression of congressional intent to overturn the constitutionality guaranteed immunity of the several states." *Id.* at 178.
>
> Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other con-

Atascadero was a suit seeking to vindicate rights granted to the handicapped under the Rehalibitation Act of 1973. The Court's solicitude for the sovereignty of the states in the context of a Fourteenth Amendment case is readily understood. The intrusion of the federal judiciary, under the Fourtheenth Amendment, into areas traditionally thought to be the prerogative of the states has been the subject of considerable comment.

> [T]he trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge's continuing involvement in administration and implementation.

A. Chayes, *The Role of the Judge in Public Law Litigation*, 98 Harv. L. Rev. 1281, 1284 (1976).

In our own Circuit, there have been several striking examples of the degree to which federal remedial decrees issued pursuant to the Fourteenth Amendment have severely restricted the discretion of the States to determine the manner in which their institutions will operate. The complexity and breadth of such orders is exemplified by *Ruiz v. Estelle*, 679 F.2d 1115, *amended in part*, 688 F.2d 266 (5th Cir. 1982), a case in which a comprehensive injunctive decree covering the operation of the Texas Department of Corrections was issued by a federal district court. Other examples of these sweeping equitable orders abound.[24]

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texts. *Id.* at 180 *quoting Fitzpatrick v. Bitzer*, 427 U.S. 445, 49 L.Ed.2d 614, 96 S.Ct. 2666 (1976).

> We have decided today that the Rehabilitation Act does not evince an unmistakable congressional purpose, pursuant to § 5 of the Fourteenth Amendment, to subject unconsenting states to the jurisdictions of the federal courts. 87 L.Ed.2d at 183.

[24] *See, e.g., Lelsz v. Kavanaugh*, 710 F.2d 1040 (5th Cir. 1983) [class action against Texas Department of Mental Health and

Atascadero is understandably concerned about abrogation of state immunity in Fourteenth Amendment cases. In the words of Professor Field

> [t]he court initially gave a miserly construction to the [Civil War] amendments precisely because it realized that the amendments would significantly shift the state-federal balance of power . . .

Field, *Garcia v. San Antonio Metropolitan Transportation Authority: The Demise of a Misguided Doctrine*, 99 Harv. L. Rev. 84,100 (1985). The Fourteenth Amendment to the Constitution, however, has not "divested the states of their original powers [to vindicate constitutional rights] and transferred them to the federal government." *Garcia*, 83 L.Ed.2d at 1033. State courts have concurrent jurisdiction over cases involving the redress of rights guaranteed by the Constitution, and in certain circumstances, the existence of an adequate state remedy for an alleged violation of federal rights may even preclude access to a federal forum. *Parratt v. Taylor*, 451 U.S. 521, 68 L.Ed.2d 420, 433-34, 101 S.Ct. 1908 (1981).

Clear statement in the context of the Fourteenth Amendment is imperative, if federal intrusion upon the state's domain is not to "prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States." *Truax v. Corrigan*, 257 U.S. 312, 343, 66 L.Ed.

Mental Retardation, ongoing in E.D. Tex., civil action No. 5-74-95-CA]; *Valley v. Rapides Parish School Board*, 646 F.2d 925 (5th Cir. 1981) [class action of sixteen years duration seeking desegregation of local public schools in Louisiana]; *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) [class action seeking to remedy unconstitutional prison conditions in the Mississippi state penitentiaries].

All of these are properly considered as Fourteenth Amendment cases because they are suits which seek the vindication of federal rights that are applicable against the States by virtue of the incorporation of the Bill of Rights through the Fourteenth Amendment.

254, 42 S.Ct. 124 (1921) (Holmes, J. dissenting).[25] When however, state experimentation threatens to trench upon areas reserved for the plenary exercise of *federal* power, I believe the state's experiment must fail. So it is when state economic regulations are held to be preempted by the federal commerce power of Art. I § 8; so it must be when a state's assertion of Eleventh Amendment immunity threatens to displace a uniform, federal remedial statute enacted pursuant to the Congress's plenary authority over admiralty.

Admiralty is a fundamental area marked by the constitution in which the states have surrendered their power to the federal government. The plenary power over admiralty, more extensive even than that over commerce, was one of the fundamental precepts upon which the Republic was founded.[26] The states' surrender of sovereignty in this area was present in the plan of the convention from its inception,[27] and has continued unchallenged and unrestricted to the present day. The states have been on notice of the scope of this federal authority since the founding of the Republic. They relinquished it in order that a fledgling nation might build a *national*, sea-going trade. It is not for Texas, after more than one hundred forty years as a member of the Union, to assert that its sovereignty over maritime matters is somehow

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[25] *See also New State Ice Co. v. Liebmann* in which Justice Brandeis observed

> [I]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

285 U.S. 262, 311, 76 L.Ed. 747, 52 S.Ct. 371 (1932) (Brandeis, J. dissenting).

[26] *See supra* pp. 7-11.

[27] *Workman v. Mayor, Alderman, and City of New York*, 179 U.S. 553, 560, 21 S.Ct. 212, 45 L.Ed. 314 (1900); *Cf. Monaco*, 292 U.S. at 322-23.

greater than that which was ceded to the national government by the Constitution.

The Jones Act poses no threat of massive, unanticipated federal intrusion upon the traditional domain of the several states. There was, and is, no need for clear statement on the part of Congress to inform the states of its intention to occupy the field in this area. The entire domain of maritime activities has been occupied by the federal presence since 1789, and exclusive jurisdiction over admiralty appears in the text of the Constitution itself. Art. I § 2. The Jones Act, as an appropriate exercise of the plenary authority of Congress over maritime affairs, provides sufficiently clear notice to the states of the congressional intent. There was no need at the time of the enactment of the Jones Act, at the time of the decision concerning FELA in *Parden*, or at the present time in view of *Employees*, *Edelman*, *Garcia*, and *Atascadero*, for Congress specifically to declare that the states were subject to federal court suit under the Jones Act. To my way of thinking, then, the Jones Act is sufficient to abrogate Texas' Eleventh Amendment immunity to suit for injuries that arise out of its operation of a ferry system.

Congressional Treatment of Federally-Employed Seamen

I find unconvincing Texas' argument that Congress could not have intended that the Jones Act should apply to the states since the federal government has not applied the Jones Act to the federal government's seamen. As the federal power over admiralty is plenary, the federal government is entitled to do with it as it will. The question is not what Congress has done with its own employees alone, the question is what has it chosen to do with all other maritime employees. Occasionally Congress has provided that federally employed seamen be covered by the Federal Employees Compensation Act (FECA), 5 U.S.C. § 8101. But this has not always been so when conditions

—war conditions—suggest a change to traditional seamen's remedies.[28]

How Congress treats federally-employed seamen simply has nothing to do with its determination that state-employed seamen are covered by the Jones Act.

Conclusion

It is my view that a substantial and settled body of Eleventh Amendment jurisprudence has established that Congress can abrogate a state's immunity to suit. In both *Parden* and *Employees*, the Court recognized that Congress has the power to bring "the States to heel, in the sense of lifting their immunity from suit in a federal court." *Employees*, 411 U.S. at 283. While Congress can induce states to waive their immunity in grant-in-aid programs, Congress is not limited to such indirect action. I believe the Supreme Court has clearly held that the national legislature possesses the power to override the Eleventh Amendment directly, without resort to any theory of state consensual waiver, when Congress acts pursuant to a plenary power given to achieve the framers' goal of uniformity. The Supreme Court has ruled that FELA meets this standard for abrogation of state immunity to suit. In this Jones Act case, involving the same statute, it is not for us to say differently.

Welch's claim as a blue water seafarer should proceed in the Federal Court.

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[28] *See* for example, *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 69 S.Ct. 1317, *rehearing denied*, 338 U.S. 839, 70 S.Ct. 32 (1949), *overruling Hurst v. Moore-McCormack Lines*, 328 U.S. 707, 66 S.Ct. 1218, 90 L.Ed. 1534 (1946); *Caldarola v. Eckert*, 332 U.S. 155, 67 S.Ct. 1569, 91 L.Ed. 1968 (1947) (cases dealing with seamen on government owned and operated ships under war shipping Administration Agents).

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 83-2253

JEAN E. WELCH,
Plaintiff-Appellant,
v.
STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION and THE STATE OF TEXAS,
Defendants-Appellees,
DROTT MANUFACTURING COMPANY and J.I. CASE CO.,
Defendants.

Oct. 31, 1984

Appeal from the United States District Court
for the Southern District of Texas

SUGGESTION FOR REHEARING EN BANC

(Opinion August 27, 1984, 5 Cir., 1984, 739 F.2d 1034)

Before CLARK, Chief Judge, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS and HILL, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the applications for rehearing en banc

and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a rate hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 83-2253

JEAN E. WELCH,
Plaintiff-Appellant,

v.

STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION and THE STATE OF TEXAS,
Defendants-Appellees,

DROTT MANUFACTURING COMPANY and J.I. CASE CO.,
Defendants.

Aug. 27, 1984

Appeal from the United States District Court
for the Southern District of Texas

Before BROWN, GEE and WILLIAMS, Circuit Judges.

GEE, Circuit Judge:

Plaintiff Jean Welch was injured in the course of her employment as a "seaman" (marine technician) while working on the ferry landing dock at Galveston, Texas. Ms. Welch sued her employer, the Texas Highway Department and the State of Texas under the Jones Act and also sued the manufacturer of the mobile crane which she asserts contributed to her injury in a products liability suit. The district court, 533 F.Supp. 403, dis-

missed her Jones Act claim on the ground that the state defendants had not waived Eleventh Amendment immunity either expressly, by virtue of the state Tort Claims Act, or impliedly, under the *Parden* doctrine.[1] Ms. Welch appeals the dismissal of her Jones Act claims [2] and we reverse.

The Eleventh Amendment immunizes an unconsenting state from federal court suits brought by citizens of the United States. A state can consent to suit, however, either expressly—by enacting a statute—or impliedly, by entering into a federally regulated sphere of activity where a private cause of action is provided for the violation of the applicable federal regulatory statute and Congress has expressly provided for that remedy to apply to the states. *Employees of the Department of Public Health and Welfare, State of Missouri v. Department of Public Health and Welfare, State of Missouri*, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973). Since we conclude that there has been an express consent, we need not consider any question of an implied one.

The Texas Tort Claims Act waives immunity to suit against the State for personal injuries proximately caused by the negligence of any officer or employee acting within the scope of employment if the injury arose from "the operation or use of a motor driven vehicle and motor driven equipment." Tex.Rev.Civ.Stat.Ann, art. 6252-19 § 3 (Vernon Supp.1980-81). Section 4 of the Torts Act specifically waives the State's immunity from suit to the extent of the "liability created by Section 3" and grants permission to all claimants to sue the State of Texas for "all claims arising" under the Act. Section 19 of the Act, however, limits this waiver of immunity by providing that a governmental unit carrying worker's

[1] *Parden v. Terminal Railway of Alabama State Docks Department*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964).

[2] The products liability part of the action has been concluded.

compensation is entitled to the privileges and immunities granted by the Workers' Compensation Act.[3] These include immunity from suits for damages under most circumstances. Section 19 reads:

> Any governmental unit carrying Workmen's Compensation Insurance or accepting the provisions of the Workermen's Compensation Act of the State of Texas shall be entitled to all of the privileges and immunities granted by the Workmen's Compensation Act of the State of Texas *to private persons and corporation.* (emphasis added).

As of 1969, however, when this statute was enacted, it had long been clear that the state could infer no immunity from federal maritime remedies on "private persons and corporations." *E.g., Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953) No private shipping company, after *Pope & Talbot* at the latest, could have rationally concluded that by taking out a state workers' compensation policy on its seamen, it could deprive them of their Jones Act remedies on the ground that state law made the compensation remedy exclusive. That this was the case was presumedly known, therefore, to the Texas Legislature when it enacted Section 19; for it is a maxim of general application, recognized by Texas courts, that:

> "All statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it. They are therefore to be construed in connection and in harmony with the existing law, and as a part of a general and uniform system of jurisprudence, and

[3] The highway department carries workers' compensation insurance under a statute specifically providing for such. Tex.Rev.Civ. Stat.Ann. art. 6674s (Vernon 1977). Section 3 of this statute limits employees to this exclusive remedy for injuries sustained while working within the course of their employment.

their meaning and effect is to be determined in connection, not only with the common law and the constitution, but also with reference to other statutes and the decisions of the courts." *McBride v. Clayton*, 166 S.W.2d 125, 128 (Tex.Sup.1942).

Since this is so, we must presume that in consenting to suit against state departments carrying workers' compensation to the same extent as "private persons and corporations" carrying such coverage could be sued, the Legislature intended the departments to be subject to federal maritime remedies.[4]

REVERSED AND REMANDED.

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[4] We recognize that our approach runs the risk of being criticized as overly technical and precious—as the dissent suggests. Despite these possible disadvantages, however, we remain convinced that the best way to ascertain a legislature's intent is to look to what it has *said*—and to presume that its statements were made and enacted into law with full understanding of the implications of their language in light of then existing jurisprudence. Any other approach creates what we consider a greater danger than technicality—that of putting this federal court in the position of second-guessing the Texas legislature.

The dissent cites *Lyons v. Texas A & M University*, 545 S.W.2d 56 (Tex.Civ.App. 1976—writ ref'd n.r.e.), as an authoritative state interpretation of the effect of section 19 and notes that *Lyons* was written by Judge Cire, the District Judge in this case, when he was on the state bench. *Lyons* does not address the specific construction argument on which we rely today and therefore cannot be read as a governing exposition of state law. More important, *Lyons* is bottomed on a fundamental misconception of the relative powers of the state and federal governments: it is not true that, as *Lyons* holds, "the State . . . could provide any remedy it wished and limit seamen to that remedy exclusively." 545 S.W.2d at 59. The proper statement would be that "the State may waive sovereign immunity or decline to do so to whatever extent it likes; but once it has waived immunity, it may not decree that the owners of maritime claims as to which it has done so are limited to the workers' compensation remedy." We note that the Texas Supreme Court, in refusing the writ n.r.e. declined to affirm the reasoning underlying the lower court's opinion. And while we recognize the consistency of the district court's views, we are not the more persuaded by them.

JOHN R. BROWN, Circuit Judge, concurring:

I concur in the result reached by Judge Gee, but I think it imperative that we reach that result by way of federal, rather than state, law. I respectfully disagree with the two views of Judge Williams that: (i) the state can impose on its waiver of immunity the unconstitutional mandatory application of the State Workers' Compensation Act; and (ii) *Parden* has lost its vitality. With this Court now speaking as a discordant trio and the outright conflict (in result and reasoning) with our former colleagues in the Eleventh Circuit,[1] this case calls for authoritative review by the Supreme Court, despite our reversal and remand for a trial.

Initially, it must be recognized that two issues are at stake in the immunity defense raised by Texas. The first question is substantive: Does the Jones Act reach state defendants who are employers of seamen? Or, do states enjoy a substantive immunity that would protect them from suit in either federal or state court? In other words, does the Jones Act apply to a person classified as a seaman in the employment of a state or state agency? The second question is jurisdictional in the Eleventh Amendment sense: Assuming there is a substantive cause of action against a state, does the Eleventh Amendment bar prosecution of the suit in federal court? Or, on the other hand, has Congress, pursuant to its enumerated constitutional powers, abrogated this jurisdictional immunity in this particular statutory cause of action? I believe that the Supreme Court has squarely answered the substantive question in *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959). The jurisdictional Eleventh Amendment question is answered in *Parden v. Terminal Ry. of Alabama State Docks Dept.*, 377 U.S. 184, 84

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[1] *Sullivan v. Georgia Dept. of Nat'l Resources*, 724 F.2d 1478 (11th Cir. 1984).

S.Ct. 1207, 12 L.Ed.2d 233 (1964). The body of recent Supreme Court decisions does not overrule these clearly applicable precedents, either explicitly or implicitly.

The inability of this Court to decide either (or both) question compels review by an authoritative tribunal.

Substantive

In enacting the Jones Act pursuant to both its admiralty-maritime power and its commerce power, Congress included within the class of Jones Act defendants those states who would employ seamen aboard vessels in navigable waters. In *Petty*, the Supreme Court held that the Jones Act applied to a claim of an employee in the category of a seaman who was injured in the operation of a ferry across the Mississippi River by a bistate agency. On the Eleventh Amendment jurisdictional issue, the Court relied in part on the language in the interstate compact between Tennessee and and Missouri as evincing consent to suit in federal court. However, on the substantive question of the application of the Jones Act, the *Petty* court relied solely on the congressional language and intent in the Jones Act:

> We can find no more reason for excepting state or bi-state corporations from "employer" as used in the Jones Act than we could for excepting them either from the Safety Appliance Act or Railway Labor Act . . . "When Congress wished to exclude state employees, it expressly so provided." The Jones Act has no exceptions from the broad sweep of the words "Any seaman who shall suffer personal injury in the course of his employment may" etc.

359 U.S. at 282, 79 S.Ct. at 790 (citations omitted). The *Petty* dissenters believed that the claim was forbidden by the Eleventh Amendment, and expressly did not reach this substantive argument. Justice Frankfurter stated: "I assume the Court is referring solely

to the substantive applicability of [the Jones] Act." 395 U.S. at 289, 79 S.Ct. at 794 (Frankfurter, J., dissenting).

Whether or not the *Petty* majority's quoted statement on the applicability of the Jones Act also included the jurisdictional question, it is clear that it settled *at least* the substantive question.[2] Like *Petty*, the instant case involved the operation by a state of a ferry boat and a suit brought under the Jones Act. Thus, the *Petty* holding is directly applicable here as to the substantive liability of Texas. The only thing which could possibly shield it from effective liability in this suit is the Eleventh Amendment.

Texas is not aided by its own statutory provision providing that state workers' compensation is the exclusive remedy for employees of governmental units carrying workmen's compensation insurance. Congress, in its constitutional admiralty and maritime power,[3] can make na-

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[2] In *Maine v. Thiboutot*, 448 U.S. 1, 9 n. 7, 100 S.Ct. 2502, 2507 n. 7, 65 L.Ed.2d 555 (1980), the Supreme Court stated: "No Eleventh Amendment question is present, of course, where an action is brought in a state court since the Amendment, by its terms, restraints only 'the Judicial power of the United States.'" *See also Maher v. Gagne*, 448 U.S. 122, 130 n. 12, 100 S.Ct. 2570, 2575 n. 12, 65 L.Ed.2d 653 (1980) (Eleventh Amendment issue is not before court in *Maine v. Thiboutot* when attorneys' fees were awarded against a state by a state court). The distinction between substantive immunity and Eleventh Amendment immunity in federal court is most clearly drawn in Justice Marshall's concurring opinion in *Employees v. Missouri Pub. Health Dept.*, 411 U.S. 279, 287-98, 93 S.Ct. 1614, 1619-25, 36 L.Ed.2d 251 (1973). In the Supreme Court's latest Eleventh Amendment opinion, the *Employees* concurrence is quoted five times, without any citation to the majority opinion in *Employees. Pennhurst State School & Hosp. v. Halderman*, —— U.S. ——, 104 S.Ct. 900, 79 L.Ed.2d 67 (1983).

[3] The admiralty and maritime power is phrased as a grant of judicial power, and is found in art. III. U.S. Const. art. III, § 1. However, the grant of admiralty jurisdiction, coupled with the necessary and proper clause has long been read to support the authority of federal judges to declare federal substantive maritime

tionally uniform maritime substantive law that is supreme with respect to conflicting state law. *E.g., Pope & Talbot v. Hawn*, 346 U.S. 406, 409-10, 74 S.Ct. 202, 204-05, 98 L.Ed. 143 (1953); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160, 40 S.Ct. 438, 440, 64 L.Ed. 834 (1920).

As an example of this federal supremacy and uniformity in the maritime area, as Judge Gee correctly observed, the Supreme Court and this Court have held that state workers' compensation statutes could not be made validly to apply to injuries occurring on navigable waters. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1986 (1917); *Ledoux v. Petroleum Helicopters*, 609 F.2d 824 (5th Cir.1980); *Thibodeaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir.1978); *cert. denied*, 442 U.S. 909, 99 S.Ct. 2820, 61 L.Ed.2d 274 (1979). As one commenator has pointed out, the Texas workers compensation provision could, at most, affect the jurisdictional Eleventh Amendment question, but not the substantive question of the application of the Jones Act.

> Thus, even assuming [arguendo] Congress did not in the Jones Act override eleventh amendment *jurisdictional* immunity, the exclusion by Texas of areas of workers' compensation coverage from the waiver of immunity in the Texas Tort Claims Act might leave the amendment applicable to limit federal *jurisdiction*, but could not prevent the applicability of federal substantive law in state court.

Comment, *Eleventh Amendment Immunity and State-Owned Vessels*, 57 Tul.L.Rev. 1523, 1545 (1983) (emphasis added).

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law and congressional power to legislate for maritime matters. *Panama RR Co. v. Johnson*, 264 U.S. 375, 386, 44 S.Ct. 391, 393, 68 L.Ed. 748 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834 (1920); *THE LOTTAWANNA*, 21 Wall (88 U.S.) 558, 22 L.Ed. 654 (1875). D. Robertson, *Admiralty and Federalism*, 145 (1970).

Nor is Texas aided in any way by *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed. 2d 245 (1976), which held that the commerce power did not justify imposing federal minimum wage standards on state employees. *Usery* reasoned that the Tenth Amendment constrains the application of congressional power against states in their sovereign capacities in such a manner as to "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." 426 U.S. at 852, 96 S.Ct. at 2474.

Having drawn a line between traditional and non-traditional state activities, the *Usery* court explicitly pointed out that its decision did not impair earlier rulings, such as *Parden v. Terminal Ry. Co.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964), approving federal commerce regulation of *non*-traditional activities such as state-owned and operated interstate railroads. 426 U.S. at 854, n. 18, 96 S.Ct. at 2475, n. 18. *Accord United Transp. Union v. Long Island RR*, 455 U.S. 678, 686, 102 S.Ct. 1349, 1354, 71 L.Ed.2d 547 (1982). A state's operation of ferry boats, like railroads, is also non-traditional, having been characterized—with no pun intended—by the *Petty* Court as "involving the *launching* of a governmental corporaation into an industrial or business field." 359 U.S. at 280, 79 S.Ct. at 789 (emphasis added). *Accord Brody v. North Carolina*, 557 F. Supp. 184 (E.D.N.C.1983) ("ferry system is essentially a commercial and proprietary enterprise").

Moreover, support for Congressional enactment of the Jones Act is not limited to the commerce power, but also includes the admiralty-maritime power. The power of Congress to control and regulate use of navigable waters frees the Jones Act from any Tenth Amendment limits on the commerce power, because the constitutional construct never reserved to the states any inviolable power to regulate maritime matters. It was assumed at the time of ratification that maritime law consisted of a body

of *international* law observed with some variations by the various national courts. Fletcher, *A Historical Interpretation of the Eleventh Amendment*, 35 Stan. L. Rev. 1033, 1082 (1983).

Finally, *Usery* has been construed too narrowly by later cases [4] for us to extend it seaward of the *Jensen* line. In any case, *Usery* is not applicable to the proprietary activity involved here. Accordingly, I am in agreement with Judge Gee's holding that when Texas employs seamen in the operation of vessels on navigable waters it is subject to the Jones Act as substantive matter.

Eleventh Amendment and Jurisdiction

The question of whether Congress intended to abrogate Eleventh Amendment federal jurisdictional immunity in

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[4] In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), the Court, distinguishing *Usury*, rejected Virginia's contention that the federal Surface Mining Control and Reclamation Act of 1977 violated the Tenth Amendment's reservation of the states' "traditional governmental function" of regulating land use. Next, the Court held in *United Transp. Union v. Long Island RR*, 455 U.S. 678, 102 S.Ct. 1349, 71 L.Ed.2d 547 (1982), that *Usury* was not applicable to a provision in the federal Railway Labor Act authorizing a strike against a state-owned railroad. A unanimous Court reasoned that "operation of railroads is not among the functions *traditionally* performed by state and local governments. Federal regulation of state-owned railroads simply does not impair a state's ability to function as a state." 455 U.S. at 686, 102 S.Ct. at 1354. In *FERC v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982), the Court upheld certain federal statutory controls on state utility regulatory commissions. Perhaps the most unkindest cut of all to *Usury* came in *EEOC v. Wyoming*, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983), in which the Court held that the Age Discrimination in Employment Act validly applied to state and local employees. The Court chose to validate the act head-on under the commerce power rather than under the Fourteenth Amendment. It has been argued that *EEOC v. Wyoming* has completely eviscerated *Usery*. Note, 14 Seton Hall 356 (1984).

Jones Act cases has also been answered. In *Parden*, an employee of a state-owned railroad operating in interstate commerce brought suit in federal court, seeking recovery from the state for personal injuries under the Federal Employers' Liability Act (FELA). FELA expressly authorized suit in federal court. In reversing this Court's holding that the state was immune, the Supreme Court held that Congress had both the power and the expressed intent to make state-owned interstate railroads subject to suit in federal court.

On the power question, the Court quoted language from *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 196-97, 6 L.Ed. 23 (1824), to demonstrate that Congress had the power to impose conditions upon a state's entry into commerce that would derogate from Eleventh Amendment rights, because the sovereignty of the states is diminished by the absolute and plenary power of Congress over commerce. 377 U.S. at 190-92, 84 S.Ct. at 1211-13.

On the question of congressional intent, *Parden* examined the language of FELA, and declared that Congress meant what it said when it made FELA applicable to "every" common carrier by railroad in interstate commerce, whether state-owned or privately owned. 377 U.S. at 187-88, 84 S.Ct. at 1210-11. Congress "conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act." *Id.* at 192, 84 S.Ct. at 1213. Thus, Alabama, by operating the railroad, subjected itself to the condition and consented to suit in federal court. In any event, Congress determined that the operator of the interstate railroad would be deemed to have consented. *Parden* emphasized that what operated as a waiver was effective regardless of whether state law permitted waiver, or whether the state knew waiver would result from its actions. *Id.* at 194, 84 S.Ct. at 1214.

Parden is uniquely applicable to Jones Act suits, because the Jones Act expressly incorporates the rules prescribed in FELA cases.[5] Because Congress in FELA conditioned operation of a state-owned railroad on an effectual waiver of sovereign and Eleventh Amendment immunity, and then expressly incorporated FELA rules into the Jones Act, Congress must have intended the same conditions to apply in Jones Act suits arising from the operation of vessels by a state. Several courts have reached this conclusion. *Brody v. North Carolina*, 557 F.Supp. 184 (E.D.N.C.1983); *In re Holoholo*, 512 F. Supp. 889, 904 (D.Hawaii 1981); *Huckins v. Board of Regents of Univ. of Michigan*, 236 F.Supp. 622, 623 (E.D.Mich.1967); *Cocherl v. Alaska*, 246 F.Supp. 328, 330 (D.Alaska 1965).

In dissenting, Judge Williams argues that the Supreme Court has "modified *Parden* by holding that it is not enough to show that the state iself is operating within a federally regulated sphere. A plaintiff must also show that Congress expressly provided that the private remedy would be applicable to the states," citing *Employees of the Dept. of Public Health & Welfare v. Missouri*, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973); *Intra-*

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[5] The Jones Act provides in part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . . .

46 U.S.C. § 688.

The extent to which Congress forbad any limitation, restriction or reduction of these rights is reflected in this part of FELA:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void.

45 U.S.C. § 55.

coastal Transp. Inc. v. Decatur County, Georgia, 482 F.2d 361 (5th Cir.1973).

This general summary of the not-entirely-consistent post-*Parden* law may trim some of the broader language in *Parden*, but it is entirely consistent with the holding in *Parden* and its application in this case. *Parden* has not been overruled by either *Employees*—which distinguished *Parden* and has itself since been distinguished—nor has it been overruled by any of the dozen or so post-*Parden* Eleventh Amendment opinions by the Court.[6] Because of the Jones Act's express incorporation of FELA, *Parden* is directly applicable here. Moreover, the express language requirement of *Employees* is satisfied by *Parden's* holding that "Congress, in making the FELA applicable to 'every' common carrier . . . meant what it said," 377 U.S. at 187, 84 S.Ct. at 1210. If, as Judge Williams observes, *Parden* is the high-water mark for congressional abrogation of Eleventh Amendment immunity, *Employees* is a high-water mark for state immunity. Because neither case has been overruled—although *Employees* has implicity been weakened—the question is which case is closer to the one before us.

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[6] *Pennhurst State School & Hosp. v. Halderman*, —— U.S. ——, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984); *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 102 S.Ct. 3304, 73 L.Ed.2d 1057 (1982); *Cory v. White*, 457 U.S. 85, 102 S.Ct. 2325, 72 L.Ed.2d 694 (1982); *Maher v. Gagne*, 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980); *Maine v. Thiboutot*, 448 U.S. 1, 9 n. 7, 100 S.Ct. 2502, 2507 n. 7, 65 L.Ed.2d 555 (1980); *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979); *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978); *Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977); *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976); *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Employees of Dept. of Pub. Health & Welfare v. Dept. of Pub. Health & Welfare*, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973).

In *Employees*, the Court framed the issue before it as whether *Parden* was applicable or distinguishable. 411 U.S. at 281, 93 S.Ct. at 1616. Finding *Parden* distinguishable in several important respects, *Employees* held that the Eleventh Amendment barred a private suit under the Fair Labor Standards Act for overtime pay brought by employees of state mental hospitals and training schools. Holding that Congress had the power to lift the states' immunity under the commerce clause, and to impose heavy fiscal burdens on the states, 411 U.S. at 284, 93 S.Ct. at 1617, the Court nevertheless declared that it would not extend *Parden* to cover every exercise of the commerce power where Congress did not indicate its purpose to do so "in some way by clear language.' 411 U.S. at 285, 287, 93 S.Ct. at 1619. Since Congress had amended the substantive provisions of the FLSA to include state employees, but had left the jurisdictional provision unchanged, the Court found this clear language lacking, and held the state immune.

The Fourth Circuit was confronted with and rejected the argument that *Employees* had effectively overruled *Parden*. *Int'l Longshoremen's Assoc. v. North Carolina*, 511 F.2d 1007 (4th Cir.1975) *adopting as op.*, 370 F. Supp. 33 (E.D.N.C.1974). The Court analyzed *Employees* in this way:

> The Court in *Employees* distinguished *Parden* on several grounds: (1) The FLSA provided for the alternate remedy of enforcement of federal statutory rights in an action brought by the Secretary of Labor, thereby providing a remedy for wronged employees while avoiding a confrontation between state and federal sovereignties, whereas in *Parden* there was no alternate remedy; (2) the FLSA provided for recovery by employees not only of the amount of unpaid wages, but also for liquidated damages in an equal amount of unpaid wages, but also for liquidated damages in an equal amount and for attorneys' fees

> whereas in *Parden*, the employees were seeking only to be made whole; and the court felt that since Congress had created such a remedy under the FLSA, with punitive characteristics, it did not intend to subject the states to suit by its own citizens, and intended instead for "the delicate federal-state relationship to be managed through the Secretary of Labor." *Employees*, *supra*; (3) *Parden* involved the operation of an interstate railroad, a function normally run by private business associations, whereas *Employees* involved a hospital, a function traditionally operated by state and local governments.
>
> It does not appear to this court that *Employees* is controlling authority in this case.

370 F.Supp. at 38. Thus, the Fourth Circuit held that a state waives its Eleventh Amendment immunity to claims under the Railway Labor Act—which *Petty* deemed identical to the Jones Act for immunity purposes, *see supra* p. 5447—when it operates a port and railroad, even though no profit is made on the operation. *Id.*

On the distinctions drawn by *Employees* between the FLSA and FELA the Jones Act is like FELA and unlike FLSA. The Jones Act contains no provision for administrative enforcement, but rather was specifically enacted to provide a private cause of action. Moreover, the Jones Act concerns the operation of vessels on navigable waters and in this case a ferry boat, which *Petty* described as "an industrial or business field," 359 U.S. at 280, 79 S.Ct. at 789, as contrasted with the state mental hospitals described by *Employees* as "not proprietary." 411 U.S. at 284, 93 S.Ct. at 1617. Certainly, the ferry boat operation here is more analogous to the railroad in *Parden* than to the public mental hospital in *Employees*. Congress' incorporation of FELA into the Jones Act indicates that Congress considered the operation of vessels and trains within the sphere of the national government—i.e., in

interstate commerce, or on navigable waters—to be analogous in terms of safety to workers. Comment, 57 Tul.L. Rev. at 1544-45.

There was yet a third distinction from *Parden* drawn in *Employees* that supports the application of *Parden*, and not *Employees*. *Employees* pointed out that the state railroad in *Parden* "involved a rather isolated state activity," whereas the FLSA would implicate "elevator operators, janitors, charwomen, security guards, secretaries, and the like in every office building in a State's governmental hierarchy." 411 U.S. at 285, 93 S.Ct. at 1618. Thus, under FLSA, the federal intrusion in state affairs would be "pervasive." *Id.* This pervasive effect made the Court look very carefully at congressional intentions to abrogate the Amendment to such a degree. In contrast, the Jones Act could affect only a handful of maritime or amphibious state employees out of many thousands. Thus, the application of the Jones Act, like FELA, is "isolated," rather than "pervasive."

Yet the difference in the reach of FLSA and FELA or the Jones Act is not merely one of degree. *Employees* emphasized that *Parden* rested on federally imposed waiver. 411 U.S. at 282, 93 S.Ct. at 1616. But there is no possible voluntary waiver of FLSA immunity in the employment of secretaries, janitors, security guards, and the like to work in the offices in a state's governmental hierarchy. A state has no choice but to employ such workers. It would be paralyzed without them. In contrast, a state could more readily operate, govern and exist without a state-owned railroad or ferry system. Thus, a concept of effectual waiver is applicable to the state's voluntary decision to run a ferry. Therefore, this case is fully distinguishable from *Employees*, and squarely controlled by *Parden*.

The Eleventh Circuit has ruled in favor of the state on the Jones Act-Eleventh Amendment issue. In *Sullivan v.*

Georgia Dept. of Nat'l Resources, 724 F.2d 1478 (11th Cir.1984), a Jones Act suit by an employee of the Georgia Department of Natural Resources who was a member of the crew of a research vessel operating on the coastal waters of Georgia was held barred by the Eleventh Amendment. However, in its quest for the "clear statement" by Congress that *Employees* and *Intracoastal* required, the Sullivan court either overlooked or ignored the express incorporation of FELA into the Jones Act and also *Parden*'s finding of "clear language" in FELA's application to "every" common carrier. Moreover, the Jones Act in clear language grants the rights of injured railroad employees to "Any seaman," without drawing any distinction for state-employed seamen. *Cf. Hutton v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978) ("the [Civil Rights Attorney's Fees Awards] Act could not be broader. It applies to 'any' action brought to enforce certain civil rights laws.") Thus, the result the *Sullivan* court reluctantly reached through application of the "clear expression" requirement was flawed.

Moreover, the *Sullivan* court expressed dissatisfaction with its own application of *Parden* and *Employees*, stating that it was nevertheless bound—as are we—by our decisions in *Intracoastal Transp., Inc. v. Decatur County, Georgia*, 482 F.2d 361 (5th Cir.1973) and *Freimanis v. Sea-Land Service, Inc.*, 654 F.2d 1155, 1158 (5th Cir. 1981). In *Intracoastal* we held that *Employees* had added a "clear statement" requirement to the *Parden* holding that entry by a state into a federally regulated sphere of actvity subjected it to federal suit. In *Freimanis*, we merely held that the many Supreme Court decisions between 1973 and 1981 had not undermined *Intracoastal*. However, we do not read *Intracoastal* or *Freimanis* to require the upholding of Eleventh Amendment jurisdictional immunity in Jones Act suits.

Intracoastal and *Freimanis* did not involve the Jones Act, but rather the "Bridge Act of 1906," 33 U.S.C. § 491

et seq., which establishes standards for bridges over navigable waters and the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. § 409. *See also Karpovs v. Mississippi*, 663 F.2d 640 (5th Cir.1981). *Intracoastal* did not hold *Parden* to have been overruled, but instead carefully pointed out the distinctions between *Employees* and *Parden* discussed above. The Bridge Act was controlled by *Employees* and not *Parden* because, among other things, like the FLSA, it was penal in nature, vested enforcement in the Attorney General and was not intended as the Jones Act to confer a private right of action on the seaman.

The most blaring distinction between *Intracoastal/Freimanis* and this case is that those cases held there was no *substantive* private cause of action created under the Bridge Acts, 482 F.2d at 367; 654 F.2d at 1160. The Jones Act, to the contrary, expressly creates a private cause of action and was purposefully enacted to assure that result. Thus, *Intracoastal* and *Freimanis* are distinguishable on the substantive question and did not reach the jurisdictional question. Assuming that *Intracoastal*'s "clear statement" requirement for deciding the substantive question also applies to the jurisdictional question, that requirement is satisfied by the Jones Act.

In *Freimanis*, the Court stated "We need not here canvass in the abstract the difficult issue of just how express Congress must be before abrogation of eleventh amendment immunities is to be found." 654 F.2d at 1159. It had already been decided in *Intracoastal* that Congress had not abrogated Eleventh Amendment immunity in the Bridge Acts.

The degree of clarity of expression the Supreme Court requires in a congressional enactment in order to find Eleventh Amendment immunity to be abrogated has varied. Although the cases are not entirely reconcilable, it appears that several factors have influenced the degree of scrutiny of the congressional language in accordance with "the principles of federalism that inform the Elev-

enth Amendment doctrine." *Pennhurst State School & Hospital v. Halderman*, —— U.S. ——, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984), *quoting Hutto v. Finney*, 437 U.S. 678, 691, 98 S.Ct. 2565, 2573, 57 L.Ed.2d 522 (1978). The degree of federal intrusion into the workings of state governments that would result from finding abrogation of immunity is an important factor, as in any problem of federalism. The contrast and the extent of potential impact between FELA and FLSA was highlighted above. This contrast brought the Court to different results in *Employees* and *Parden*. Likewise, the Court has held that in section 1983 suits, which now number like leaves on the trees, that immunity is not abrogated. *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979). Yet in *Hutton v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), the Court found in language no more specific than the Jones Act, an abrogation of Eleventh Amendment immunity in the Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. § 1988. The *Hutto* Court disinguished *Employees*, stating that the purpose of the *Employees* clear expression requirement was to insure that "Congress has not imposed 'enormous fiscal burdens on the States' without careful thought." 437 U.S. at 697 n. 27, 98 S.Ct. at 2577 n. 27. Thus, under the Jones Act, which covers a relatively small group of state employees, and which invokes the supremacy and national uniformity of federal statutory maitime law, the purpose of *Employees* would not be served by a rigorous application of the clear statement rule.

The Jones Act applies to Texas and its state-operated vessels. Ordained by the national government under its preeminent congressional admiralty-maritime powers, the application of the Jones Act is as free from the restraints of the Eleventh Amendment as is FELA's regulation of state-operated interstate railroads.

Petty and *Parden* are still controlling. They should control here.

JERRE S. WILLIAMS, Circuit Judge, dissenting:

The majority opinion finds an express waiver of immunity by the State of Texas under the Texas Tort Claims Act and the Texas Workers' Compensation Act as they apply to an injured maritime employee of the State of Texas. To reach this result the opinion engages in a strained and unjustified interpretation of the statutes. I, therefore, must dissent from the conclusion that the State of Texas has waived its sovereign immunity in this case.

Briefly, the argument is that in waiving sovereign immunity under the Texas Tort Claims Act, the state defines such a waiver as to state agencies carrying workers' compensation in the words of Section 19 of the Tort Claims Act that the governmental unit is entitled to the "privileges and immunities" granted by the Compensation Act. Then, the opinion concludes that since the Texas Workers' Compensation Act cannot protect private maritime employers from employees suing under the Jones Act, *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953), the giving of the "privileges and immunities" of the Workers' Compensation Act to the state government units also takes away the sovereign immunities of the state government units from being sued by the government employees under the federal statute.

It is a peculiar interpretation, and to me an obvious thwarting of legislative policy, to find that granting "privileges and immunities" to a state governmental unit also includes placing upon the state units what must be called exceptions, disabilities and obligations of the Compensation Act. To see in this an express and intentional waiver of sovereign immunity by the State of Texas is a tortured interpretation contrary to any common understanding of the words.

The obvious purpose of Section 19 of the Texas Tort Claims Act is to give to the governmental unit as much

protection from lawsuits by injured workers as the State of Texas gives private corporations. It is obviously not intended to go on and say that the governmental unit is subjected to additional federally imposed obligations as are private corporations. If that is what the Legislature had had in mind, it could very easily have said so. How a state grant of "privileges and immunities" to a state governmental unit can constitute an express waiver by the state of the important principle of sovereign immunity is simply beyond my comprehension. It is not the *state* that grants the Jones Act suit to injured maritime workers of private employers; it is *federal* law which controls. But if the maritime employee is a state employee, the *state* must grant the right through a waiver of sovereign immunity if there can be suit against the state under the Jones Act.

It is also of critical importance to realize that the issue of whether the state has enacted an express waiver of sovereign immunity is a matter of the interpretation of state law. If the state has spoken in interpreting its law, it is not within the authority of this Court to reinterpret that law. We have the authoritative state interpretation of these very provisions. In *Lyons v. Texas A & M University*, 545 S.W.2d 56 (Tex.Civ.App.1976), the precise issue of the case before us was decided by the Texas Court. That case involved the injury of a seaman on a vessel owned and operated by Texas A & M University, a governmental unit of Texas. Again, the Texas Workers' Compensation Act had been adopted by the University and was applicable to the injury. Lyons, however, brought suit to recover damages for unseaworthiness, maintenance and cure, and negligence under the Jones Act. The Texas Court of Civil Appeals in an opinion by Justice Cire held that the state district court had been correct in dismissing the claim, finding the Texas Workers' Compensation remedy the exclusive remedy under the Texas Tort Claims Act and the applicable Texas Workers' Compensation

Statute. The Court held that Section 19 of the Texas Tort Claims Act gave the University "all the privileges and immunities granted" by the Workers' Compensation laws and made its remedy exclusive. The Supreme Court of Texas denied review, finding no reversible error. Tex. Writs of Error Table, 134 (1982).

We are bound by this interpretation of the Texas law by the Texas Court of Civil Appeals with writ of error refused. The state has interpreted these statutes as not constituting a waiver of sovereign immunity. It is significant to note that Justice Cire, who with his colleagues established this interpretation of the Texas laws as a member of the Texas Court of Civil Appeals, is now United States District Judge Cire who rendered decision in the case which is before us. In his decision he properly gave the same interpretation. It surely strengthens the application of the state law for the district judge who applied it to have been the judge who created the authoritative state interpretation when he was a Justice of the state court. Judge Cire knew what the law of the State of Texas was with respect to express waiver. We have no authority to overrule him.

As a matter of analysis I cannot accept a magic that creates disabilities and obligations out of a grant of "privileges and immunities". But even if I am wrong in that respect, the issue is one of state law, we have the authoritative state interpretation, and the majority opinion does not follow it. Need more be said? There is no express waiver.

Since I take the position there is no express waiver, I must face the additional issue of whether there is an implied waiver by the State of Texas. Here I also think it is clear that there is not. *Parden v. Terminal R.R. Co.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964), constitutes the high water mark of the Supreme Court finding a forced implied state waiver of sovereign immunity in Federal Employers' Liability Act and Jones Act

claims. In that case the Court took the position that merely by operating an interstate railroad, a federally regulated business, the state waived its sovereign immunity.

The Supreme Court has backed away from that extreme holding as its full implications have surfaced. Thus in *Employers of the Dept. of Public Health & Welfare v. Dept. of Public Health & Welfare*, 411 U.S. 279, 286, 93 S.Ct. 1614, 1618, 36 L.Ed.2d 251 (1973), the Supreme Court modified *Parden* by holding that it is not enough to show that the state itself is operating within a federally regulated sphere. A plaintiff must also show that Congress expressly provided that the private remedy would be applicable to the states.

Relying upon *Employers*, we held in *Intracoastal Transportation, Inc. v. Decatur County, Georgia*, 482 F.2d 361 (5th Cir.1973), that the state had not impliedly waived its immunity against claims brought under the Bridge Act of 1906 simply by operating in a federal regulated sphere. "[T]he private litigant must show that Congress expressly provided that the private remedy is applicable to the states." *Id.* at 365. There is no such express provision in the Jones Act. And in *Freimanis v. Sea-Land Service, Inc.*, 654 F.2d 1155, 1160 (5th Cir.1981), we extended our decision in *Intracoastal* to find no implied waiver of sovereign immunity when the cause of action was brought under the River and Harbors Appropriation Act of 1899, 33 U.S.C. § 401.

But the Supreme Court has now gone even further in protecting the states in their own governmental activities from the regulatory intrusion by the United States. In 1974, Congress broadened the coverage of the Fair Labor Standards Act, 29 U.S.C. § 201, et seq., specifically to include "public agencies", including "the government of a state or political subdivision thereof." 29 U.S.C. § 203(d)(x). This opened the states to liability

under the FLSA to its own governmental employees with enforcement of the law by the United States Government and also by private suits brought by the employees.

The Supreme Court had earlier upheld a much narrower extension of the Fair Labor Standards Act applying it to "state hospitals, institutions and schools." *Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968). But after carefully considering the serious intrusion upon the ability of a state to carry out its own governmental activities when the federal government dictates state employment policies, the Supreme Court just eight years later specifically overruled *Maryland v. Wirtz*. The Court held unconstitutional Congress' intrusion of the Fair Labor Standards Act into state governmental activities. *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976).

We no longer find that the "plenary power" of Congress to regulate in the delegated areas of federal regulation overrides the critical importance of recognizing the states as governmental entities in a federal system. The states must be left to carry out their own governmental functions in ways which they decide are best. The Court in *Usery* concluded:

> Congress may not exercise that power so as to force directly upon the states its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. We agree that such assertions of power if unchecked, would indeed, as Mr. Justice Douglas cautioned in his dissent in *Wirtz*, allow "the National Government [to] devour the essentials of state sovereignty," 392 U.S. at 205, 88 S.Ct. at 2028, ...

It is not necessary at this time to decide if Congress has the power to force the application of the Jones Act on the various states by affording that remedy to mari-

time employees of the state government itself as it carries out its governmental functions. I am willing to assume for purposes of this decision that the traditionally strong policy of the federal government in dealing with maritime matters would justify such a conclusion, even though the *Usery* case can be said to raise considerable doubt. But what is of critical importance is that before that issue arises, Congress, in spite of state sovereignty considerations, must undertake specifically to force the states to be subservient to federal regulation with respect to their own employees engaging in these governmental activities. Congress has not done this. It cannot be said that there is an implied waiver by the State of Texas. There is no activity by the State of Texas which can possibly implicate a waiver. And the silence of Congress cannot be taken as driving the state into a waiver by implication.

With regard to Judge Brown's scholarly and thorough concurring opinion, I make only this one pertinent observation. The injury to Welch in this case took place in connection with the operation of a state owned ferry boat. This ferry boat was operated by the Texas Highway Department as part of its highway system. It operated in lieu of a bridge. This overriding fact removes it substantially from comparison to the railroad involved in *Parden v. Terminal Ry. of Alabama State Docks Dept.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964). That case involved a terminal railroad serving docks. By law of the State of Alabama it was specifically a "common carrier" and was operating for profit. It is clear in *Parden* that the State had moved out of its governmental functions into commercial and proprietary activity in the operation of the railroad. In contrast, in this case, the State of Texas was operating the ferry as part of a well recognized thoroughly governmental non-profit function—the building and maintaining of an effective highway system for its citizens. In spite of the weakening

of *Parden* in later cases as described above, if *Parden* needs to be distinguished, it is easily distinguishable as a proprietary, for profit, business operation of a common carrier by the State.

I conclude, therefore, that Judge Cire was fully correct in applying the state law in interpreting the state statutes to find that there is no express waiver of sovereign immunity in a suit brought by a state maritime employee carrying out governmental functions. I further find no justification or authority for an implied waiver. Allowing the federal government to intrude upon the way a state government carries out its own governmental functions is a questionable and delicate business at best. We should not readily assume that the state has yielded its control over its own employees to the federal government nor should we readily assume that the federal government is insisting that the state, regardless of its own interest, be forced to yield its control over its own employees.

Finally, this injured employee is not left without remedy. The State of Texas entitles her to full Texas Workers' Compensation under the Texas law. Texas voluntarily has waived sovereign immunity to protect its government employees under its own law.

I dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. No. H-81-2593

JEAN E. WELCH

vs.

STATE DEPARTMENT OF HIGHWAYS AND
PUBLIC TRANSPORATION, *et al.*

[Filed Mar. 1, 1982]

MEMORANDUM AND ORDER

Before the Court is a motion to dismiss filed by Defendants the State of Texas and its State Department of Highways and Public Transportation. For the reasons indicated below, the Court is of the opinion that this motion should be GRANTED. The Court therefore ORDERS that the Jones Act claims of Plaintiff against the State of Texas and its Department of Highways and Public Transportation are DISMISSED with prejudice.

Plaintiff brought this suit in admiralty against the State of Texas and its State Department of Highways and Public Transportation (DHPT) pursuant to the Jones Act, 46 U.S.C. § 688. and against two private companies pursuant to common law negligence and strict liability. Plaintiff alleges in her complaint that she was employed as a seaman by the DHPT or the State when she was crushed between a mobile crane and the dock

where she was standing in the course and scope of her employment as a marine technician on or about March 4, 1981.

The State and the DHPT have filed a motion to dismiss for want of subject matter jurisdiction claiming the protections of the eleventh amendment and the doctrines of sovereign immunity and governmental immunity in tort. Plaintiff responded to this motion by arguing that the Defendants waived these defenses to suit by operating a ferry service in commerce over navigable waters, which is within a federally regulated sphere of activity. The State and the DHPT contend, however, that they have neither expressly nor impliedly consented to suit and, further, that the exclusive remedy provision of the workers' compensation statute precludes suit under the Jones Act.

The eleventh amendment provides that states may not be sued in federal courts by citizens of another state or citizens or subjects of a foreign state. U.S. CONST. amend. XI. This protection from suit has been construed to preclude as well a suit against a state by a citizen of that state. *Great Northern Life Ins. Co. v. Read*, 332 U.S. 47, 64 S. Ct. 873 (1944); *Hans v. Louisiana*, 134 U.S. 1 (1890). The eleventh amendment immunity also clearly encompasses suits in admiralty. *Ex Parte State of New York*, 256 U.S. 490 (1920); *Mifsud v. Palisades Geophysical Institute, Inc.*, 484 F. Supp. 159 (S.D. Tex. 1980).

The Fifth Circuit addressed the status of eleventh amendment immunity most recently in *Karpvos v. Mississippi*, 663 F.2d 640 (5th Cir. 1981) and explained several principles that the Court finds directly relevant to this action:

> [As] a general matter suits against the state for prospective injunctive relief are permitted in limited circumstances, *Ex parte Young*, 209 U.S. 123, 28

> S. Ct. 441, 52 L. Ed. 714 (1908), but suits against the state treasury are absolutely barred. *Edelman v. Jordan* [415 U.S. 651, 94 S. Ct. 1347 (1974)] . . . . [This] immunity extends beyond the state and encompasses state agencies, officials and employees "when the action is in essence one for the recovery of money from the state . . . ." *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464, 65 S. Ct. 347, 350, 89 L. Ed. 389 (1945). In such cases, "the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Id.*; *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 66 S. Ct. 745, 90 L. Ed. 862 (1946). [Finally], the eleventh amendment applies unless a federally created right is at issue, or a state has either consented to suit in federal court or has waived its eleventh amendment shield. *Parden v. Terminal Railroad Co.*, 377 U.S. 184, 84 S. Ct. 1207, 12 L. Ed.2d 233 (1964).

Id. at 643-44 (footnote omitted). Because Plaintiff seeks a monetary recovery that would be paid from the state treasury, *Karpovs* definitively precludes Plaintiff's argument that even if the State were entitled to assert eleventh amendment immunity, the DHPT would not be similarly protected.

Planitiff's opposition to this motion to dismiss relies heavily on the Supreme Court's *Parden* decision. In *Parden*, the Supreme Court found that a state could waive its eleventh amendment immunity by merely operating within a federally regulated sphere. Although the federally regulated sphere in *Parden* was interstate railroads, lower courts later used the *Parden* reasoning to find that a state waived its immunity to the Jones Act by operating within the federally regulated maritime sphere. *Rivet v. East Point Marine Corp.*, 325 F. Supp. 1265, 1267 (S.D. Ala. 1971), *ovr'd*, *Benniefield v. Valley*

Barge Lines, 472 F. Supp. 314, 317 (S.D. Ala. 1979); *Huckins v. Board of Regents of the University of Michigan*, 263 F. Supp. 622, 623 (E.D. Mich. 1967); *Cochrel v. Alaska*, 246 F. Supp. 328, 330 (D. Alaska 1965).

Subsequent to these decisions, however, the Supreme Court decided *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279, 93 S. Ct. 1614 (1973). In *Employees*, the Court refused to extend *Parden* to cover every piece of legislation passed by Congress pursuant to its commerce power. Rather, *Employees* added an additional requirement to the *Parden* test for determining whether a state has implicitly waived its eleventh amendment immunity by operating within a federally regulated sphere: the private litigant must show that Congress expressly provided that the private remedy would be applicable to the States. 411 U.S. at 286, 93 S. Ct. at 1619.

Later that same year, the Fifth Circuit applied this new test to a suit brought under the Bridge Act of 1906, 33 U.S.C. § 491, and found that eleventh amendment immunity afforded the state agency being sued a complete defense. *Intracoastal Transportation, Inc. v. Decatur County, Georgia*, 482 F.2d 361 (5th Cir. 1973). This reasoning was followed by the Fifth Circuit in 1981 when it reaffirmed its interpretation of the Bridge Act of 1906 and extended its decision to find no implicit waiver of sovereign immunity when the cause of action was alternatively brought pursuant to the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 401. *Freimanis v. Sea-Land Service, Inc.*, 654 F.2d 1155, 1160 (5th Cir. 1981). The Fifth Circuit's decision in *Karpovs*, *supra*, was another reaffirmation that these two pieces of federal legislation did not implicitly waive the states' eleventh amendment immunity.

Freimanis relied to a great extent on the Supreme Court's latest pronouncement on whether a state can

implicitly waive its eleventh amendment immunity. In *Quern v. Jordan*, 440 U.S. 332, 345, 99 S. Ct. 1139, 1147 (1979), the Court held that the Civil Rights Act of 1871, 42 U.S.C. § 1983, did not abrogate the eleventh amendment immunity of the states. While distinguishing other cases where this immunity was held to be waived, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666 (1976) (Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e) and *Hutton v. Finney*, 437 U.S. 678, 98 S. Ct. 2482 (1978) (Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. § 1988), the Supreme Court noted that section 1983 neither explicitly swept away the states' eleventh amendment immunity nor had a history that focused directly on the question of state liability and demonstrated a clear Congressional decision to abrogate that immunity. 440 U.S. at 345, 99 S. Ct. at 1147.

The wording of the Jones Act itself does not include an express decision by Congress to abrogate the eleventh amendment immunity of the states and Plaintiff has not demonstrated through the legislative history of this statute that Congress had a specific intent to allow private parties to bring suit against a state. The Court therefore finds that neither the State nor the DHPT have implicitly waived their eleventh immunity by operating within a sphere arguably covered by the Jones Act.

Plaintiff argues alternatively that the State has expressly consented to be sued and has thus waived its eleventh amendment protection. The Texas Torts Claims Act allows suit against the State for personal injuries proximately caused by the negligence of any officer or employee acting within the scope of employment if the injury arose from "the operation or use of a motor driven vehicle and motor driven equipment." TEX. REV. CIV. STAT. ANN. art. 6252-19 § 3 (Vernon Supp. 1980-81). Section 4 of the Texas Torts Claims Act specifically waives the State's immunity from suit to the extent of the "liability created by Section 3" and grants permission

to all claimants to sue the State of Texas for "all claims arising" under the Act. TEX. REV. CIV. STAT. ANN. art. 6252-19 § 4 (Vernon 1970).

The State of Texas then attempts to limit this waiver of immunity in section 19 of the Act, which provides that a governmental unit carrying worker's compensation is entitled to the privileges and immunities granted by the Workers' Compensation Act. The DHPT carries worker's compensation insurance, under a statute specifically providing for such. TEX. REV. CIV. STAT. ANN. art. 6674s (Vernon 1977). Section 3 of this statute limits employees to this exclusive remedy for injuries sustained while working within the course of their employment.

Plaintiff argues that the exclusive remedy provision in the workers' compensation statute cannot preclude her recovery under the Jones Act and bases this argument on *Roberts v. City of Plantation*, 558 F.2d 750 (5th Cir. 1977). In *Roberts*, the Fifth Circuit held that if the plaintiff could prove himself entitled to Jones Act recovery, the exclusive remedy provisions of Florida's workers' compensation statutes could not oust the federal court of its jurisdiction. Similarly, the Fifth Circuit held in *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978), *cert. denied*, 442 U.S. 909, 99 S. Ct. 2820 (1979), that the Louisiana state providing that workers' compensation would be the exclusive remedy for an injured oil field maintenance and construction worker could not result in a dismissal of a Jones Act suit. *See also Ledoux v. Petroleum Helicopters, Inc.*, 609 F.2d 824 (5th Cir. 1980).

In neither *Roberts* nor *Thibodaux*, however, could the defendants assert an eleventh amendment immunity defense. These cases are therefore clearly distinguishable from the present action. A state is entitled to eleventh amendment immunity from the Jones Act and thus may be sued only with its consent, unlike a private defendant.

Although Texas chose to waive its immunity through the Texas Torts Claim Act, it expressly limited that waiver when workers' compensation coverage is provided.

The Court therefore finds that the exclusive remedy provision in the workers' compensation statute for employees of the DHPT also precludes Plaintiff's Jones Act suit against her employer and the State of Texas. *See Mifsud v. Palisades Geophysical Institute, Inc.*, 484 F. Supp. 159 (S.D. Tex. 1980); *Lyons v. Texas A&M University*, 545 S.W.2d 56 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e).

In conclusion, the State and DHPT are protected from Plaintiff's Jones Act claim against them in this Court by operation of eleventh amendment immunity. The Court therefore finds it unnecessary to address Defendant's alternative theories under the separate doctrines of sovereign immunity and governmental immunity in tort.

The motion to dismiss of Defendants the State of Texas and the Texas Department of Highways and Public Transportation is hereby GRANTED.

SIGNED and ENTERED this 1st day of March 1982.

/s/ George E. Cire
GEORGE E. CIRE
United States District Judge

No. 85-1716

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

JEAN E. WELCH,

Petitioner

v.

STATE DEPARTMENT OF HIGHWAYS
AND PUBLIC TRANSPORTATION AND
THE STATE OF TEXAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE
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OCTOBER TERM, 1985

JEAN E. WELCH,
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v.

STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION AND THE STATE OF TEXAS,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COME the State Department of Highways and Public Transportation and the State of Texas, respondents, by and through their attorney, the Attorney General of Texas, and file this Brief in Opposition.

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS PRESENTED ARE UNWORTHY OF REVIEW

As provided in Supreme Court Rule 17, review on writ of certiorari is not a matter of right, but of judicial discretion, and

will be granted only when there are special and important reasons. In this case, there are none. To begin with, the Fifth Circuit and the Eleventh Circuit, the two courts of appeals that have considered the questions presented, have reached the same conclusion: a state is not subject to suit by an injured state maritime employee in federal court under the Jones Act. *Welch v. State Dep't of Highways,* 780 F.2d 1268, 1274 (5th Cir. 1986) (en banc); *Sullivan v. Georgia Dep't of Natural Resources,* 724 F.2d 1478, *reh'g en banc denied,* 729 F.2d 782 (11th Cir.), *cert. denied,* _____U.S._____, 105 S.Ct. 222 (1984).

Moreover, both courts of appeals applied the well-settled principles of Eleventh Amendment immunity announced by this Court, most recently in *Atascadero State Hospital & California Dep't of Mental Health v. Scanlon,* _____U.S._____, 105 S.Ct. 3142 (1985). There are no novel points of law for this Court to consider. Just as the Court denied a writ of certiorari to the Eleventh Circuit in *Sullivan,* it should deny a writ of ceritorari to the Fifth Circuit in *Welch.*

II. CONGRESS HAS NOT ABROGATED THE ELEVENTH AMENDMENT IMMUNITY OF THE STATES IN THE JONES ACT.

A. *An unequivocal expression of congressional intent is required to find that Congress abrogated immunity.*

Before finding that a congressional statute abrogates immunity to suit in federal court, there must be a clear statement of congressional intent to apply the statute to the states. *Quern v. Jordan,* 440 U.S. 332, 337-46, 99 S.Ct. 1139, 1143-47 (1979). Indeed, the Court's most recent formulation requires that there be an "unequivocal expression of congressional intent." *Atascadero State Hospital & California Dep't of Mental Health v. Scanlon,* _____U.S._____, 105 S.Ct. 3142, 3147 (1985). To escape the application of this rule, petitioner relies upon the now discredited reasoning in *Parden v. Terminal Ry. of Ala. St. Docks Dept.,* 377 U.S. 184, 84 S.Ct. 1207 (1964). The *Parden* court reasoned that because the Federal Employers' Liability Act (FELA) was applicable to "every" common carrier, the FELA included state railroads. *Id.*

Four justices dissented in *Parden,* citing the clear statement rule. 377 U.S. at 198-200, 84 S.Ct. at 1216-17. The dissenters' view ultimately prevailed in *Employees of the Dept. of Public Health and Welfare v. Missouri,* 411 U.S. 279, 93 S.Ct. 1614 (1973). In *Employees* the question was whether the Fair Labor Standards Act subjected a state to suit. *Id.* Applying the clear statement rule, the court held it did not. *Id.* Thus, use of the correct rule of construction is critical to a proper decision. There must be a clear statement—an unequivocal expression—of congressional intent.

Petitioner argues that the clear statement rule of *Atascadero* does not control this case because the Rehabilitation Act in question in *Atascadero* was enacted pursuant to congressional power under the Fourteenth Amendment, while the Jones Act in question in the case at bar was enacted pursuant to congressional power over admiralty. A clear statement is not necessary to abrogate Eleventh Amendment immunity in admiralty, petitioner implicitly reasons, because admiralty power is somehow more pervasive or stronger than Fourteenth Amendment power.

Petitioner's argument fails in its premise. Congress has admiralty power only by inferring congressional authority through the necessary and proper clause in article I, § 8, and only to the extent that such power is necessary and proper to effectuate the grant of *judicial* power over admiralty in article III, § 2. *O'Donnell v. Great Lakes Dredge & Dock Co.,* 318 U.S. 36, 39-40, 63 S.Ct. 488, 490 (1943); *Southern Pacific v. Jensen,* 244 U.S. 205, 214-15, 37 S.Ct. 524, 528 (1916). This judicial power, however, does not extend to the states because of the Eleventh Amendment. *In re State of New York,* 256 U.S. 490, 41 S.Ct. 588 (1921). Because congressional power to reach the states under the necessary and proper clause of article III can be no broader than the article III judicial power from which it is derived, congressional admiralty power is likewise limited by the Eleventh Amendment.

Petitioner's argument that a lesser showing of intent to abrogate is required in admiralty cases than in Fourteenth Amendment cases is, therefore, exactly backwards. While congressional power over admiralty is limited to what is necessary

and proper to effectuate article III judicial power, section 5 of the Fourteenth Amendment expressly grants Congress the power "to enforce, by appropriate legislation, the provisions of this article." Since the whole point of the Fourteenth Amendment is to limit state power, its grant of congressional power to enforce its provisions necessarily includes the power to abrogate state immunity. Thus, Congress has more power over the states under the Fourteenth Amendment than it has under article I, § 8, to implement article III, § 2. Therefore, if a clear statement is required to find abrogation of immunity in Fourteenth Amendment cases, a fortiori a clear statement is required in admiralty cases.

B. *The Jones Act is not an unequivocal expression of congressional intent.*

1. *The general term "any seaman" does not unequivocally include state seaman.*

Accepting the clear statement rule, petitioner argues that the provision that "*any* seaman" may bring suit clearly includes state seaman. However, general terms (for example, person, persons, bodies politic, etc.) are not unequivocal expressions. *United States v. United Mine Workers of America*, 330 U.S. 258, 272-73, 67 S.Ct. 677, 686 (1947). By their very nature, general terms do not show the specific contemplation required to abrogate immunity. *Id.*

Petitioner, however, cites *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 282-83, 79 S.Ct. 785, 791 (1959), for the proposition that Congress intended to include the states in the class of employers subject to the Jones Act by providing that any seaman could sue his employer. *Petty* is of no use for three reasons. First, *Petty* turned on consent to suit; the finding that the states were included in the Jones Act was an afterthought, an alternative rationale. 359 U.S. at 276-84, 79 S.Ct. 787-90. Second, only three of nine justices joined in holding that the states were included in the Jones Act. Three other justices joined in the judgment but specifically refused to reach the Eleventh Amendment issue, having found consent to suit. 359 U.S. at 283, 79 S.Ct. at 791. Three justices dissented, also refusing to reach the issue of whether the Jones Act includes

the states. 359 U.S. at 289, 79 S.Ct. at 794. Finally, the three justices who did conclude that the Jones Act applied to the states did not employ the clear statement rule. 359 U.S. at 282-83, 79 S.Ct. at 790. Given that stare decisis has limited application in a case of constitutional immunity, *Edelman v. Jordan*, 415 U.S. 651, 671, 94 S.Ct. 1347, 1395-60 (1974), this three-justice-alternative-holding should be completely disregarded in light of the development of the clear statement rule.

Thus, the general authorization in the Jones Act that "any seaman" may bring suit, like the general authorization in the Civil Rights Act that "every person" shall be liable, is not a sufficiently clear statement from which to conclude that Congress intended to abrogate the immunity of the states. *See Quern v. Jordan*, 441 U.S. at 340-45, 99 S.Ct. at 1145-47.

To counter these precedents, petitioner relied in the court of appeals upon *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565 (1978), for the proposition that language no more specific than that of the Jones Act abrogated immunity in the Civil Rights Attorneys' Fee Award Act, 42 U.S.C. § 1988. The petitioner, however, ignores the *Hutto* court's express and heavy reliance on legislative history to find an abrogation of immunity. *See Hutto v. Finney*, 437 U.S. at 698 n.31, 98 S.Ct. at 2577 n.31. General language coupled with express legislative history may be the "unequivocal expression of congressional intent" required. General language alone, however, is not. *Compare Quern v. Jordan*, 440 U.S. at 340-45, 99 S.Ct. at 1145-47, *with Hutto v. Finney*, 437 U.S. at 698, 98 S.Ct. at 2577.

2. *The incorporation of the FELA is not an unequivocal expression of congressional intent.*

Not finding a clear statement in the terms of the Jones Act, petitioner turns to a theory of incorporation. The Jones Act incorporates the Federal Employers' Liability Act, 45 U.S.C. § 51, as follows:

> *Any seaman* who shall suffer personal injury in the course of his employment *may*, at his election, *maintain an action* for damages at law, with the right of trial by

jury, and *in such action* all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right to trial by jury, and *in such action* all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principle office is located.

46 U.S.C. § 688 (emphasis added).

Petitioner offers a two-step argument as to why the incorporation of the FELA is congressional abrogation of immunity to a Jones Act claim. First, petitioner notes, the FELA authorizes suit against the state when the state employs a railwayman. *See Parden*, 377 U.S. at 184, 84 S.Ct. at 1207. Second, petitioner argues, because the Jones Act incorporates the FELA, the Jones Act must authorize a suit against the state when the state employes a seaman.

Petitioner's argument is flawed. The Jones Act does not incorporate the FELA as to *who* may sue. A careful examination of the portion of the Jones Act *underscored* above reveals that the Jones Act incorporates the FELA standards of liability as to "such action" authorized by the Jones Act. The Jones Act, however, does not incorporate the FELA to define who may sue or be sued. The statute defines who may sue or be sued only by the terms "Any seaman...may...maintain an action...." As noted, this general authorization is not an unequivocal expression. Incorporation of the FELA merely extends to seaman who may maintain an action the remedies available to railway workers, and thereby obliterates the traditional distinctions between the kinds of negligence for which a shipowner is liable. *See Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 545-48, 80 S.Ct. 926, 930-31 (1960).

Moreover, when Congress enacted the Jones Act in 1920, it had no idea that the FELA, earlier enacted in 1908, would be

held in 1964 in *Parden to authorize a railway employee to sue a state employer. Parden* itself was not based upon any unequivocal expression of congressional intent in the FELA, but upon the now discredited theory of applying the federal statute to a state entering into a federally regulated sphere of activity. 377 U.S. at 196, 84 S.Ct. at 1215. While as a matter of stare decisis the holding in *Parden* may have vitality, its discredited rationale has been laid to rest and should have no force beyond its grave. Thus, the incorporation of the FELA in the Jones Act is not an unequivocal expression of congressional intent to abrogate the immunity of the state.

3. *The legislative history of the Jones Act does not contain an unequivocal expression of congressional intent.*

As noted earlier, the legislative history of a statute may contain an unequivocal expression of congressional intent. Indeed, when Congress intends to abrogate the constitutional right of state immunity, one would expect the legislative history of the statute in which it does so to reflect this intention. *Quern v. Jordan*, 440 U.S. at 343, 99 S.Ct. at 1146. As noted by the district court, however, petitioner in this case points to nothing in the legislative history of the Jones Act to suggest that Congress intended to authorize suits against the states. *Welch v. State Dep't of Highways*, 533 F.Supp. 403, 406 (S.D. Tex. 1982).

The respondents have undertaken an independent and complete examination of the legislative history of the provision in question—46 U.S.C. § 688. In its present form, this provision became law in 1920 and has never been amended. It is commonly known as the Jones Act and was part of the Merchant Marine Act of 1920. The legislative history reveals no intention to abrogate immunity or create a private remedy against the states. *See Providing for the Disposition, Regulation, or Use of Property Built or Acquired by the United States: Hearings of H.R. 10378 Before the House Comm. on the Merchant Marine and Fisheries*, 66th Cong., 1st Sess. (1919); *Establishment of an American Merchant Marine: Hearings Before the Senate Comm. on Commerce*, 66th Cong., 2d Sess. (1919-1920); H.R. Rep. No. 443, 66th Cong., 1st Sess. (1919); H.R. Rep. No. 1093, 66th Cong., 2d Sess (1920); H.R. Rep. No. 1102, 66th

Cong., 2d Sess. (1920); H.R. Rep. 1107, 66th Cong. 2d Sess. (1920); S. Rep. No. 573, 66th Cong., 2d Sess. (1920); 59 Cong. Rec. 6494, 6803-6816, 6857-6869, 6984-6994, 7036, 7043-7048, 7163, 7164, 7198, 7211, 7223-7227, 7274, 7291, 7293-7296, 7326, 7334, 7336, 7347-7356, 7409-7420, 7504, 8163, 8182, 8290, 8334, 8338, 8412, 8442, 8465-8470, 8487, 8489, 8493, 8572, 8576, 8588-8609, 8620, 8622, 8678, 9360, 9367 (1920). *See also The Establishment and Development of an Adequate Merchant Marine as Suggested by the United States Shipping Board: A Communication to Hon. Wm. S. Greene, Chairman of the House Comm. on the Merchant Marine and Fisheries,* 66th Cong., 1st Sess. (1919); *President's Message to Congress on the American Merchant Marine,* H.R. Doc. 201, 67th Cong., 2d Sess., 9 (1922).

What the legislative history does reveal is that the Merchant Marine Act of 1920 was adopted to address two post-World War I problems: an inadequate merchant marine and a surplus of navy vessels. S. Rep. No. 573, 66th Cong., 2d Sess., 1, 4 (1920); H.R. Rep. 443, 66th Cong., 1st Sess., 2 (1919). These two concerns dominate the legislative history. The provision now before the court, 46 U.S.C. § 688, received scant attention. *See* G. Gilmore & C. Black, *The Law of Admiralty* § 6-20 at 327 (2d ed. 1975).

Because it is inconceivable that the representatives of the several states would have passed a provision intended to abrogate the constitutional right of state immunity without comment, one can only conclude that they did not intend this provision to apply to state seamen. Thus, nowhere is there the clear statement required to abrogate immunity.

CONCLUSION

WHEREFORE, for all these reasons, respondents pray that the petition for writ of certiorari be denied.

Respectfully submitted,

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June 1986

ATTORNEYS
FOR RESPONDENTS

(3)

No. 85-1716

In The
Supreme Court of the United States
October Term, 1985

JEAN E. WELCH,
Petitioner,

v.

STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION and THE STATE OF TEXAS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 21, 1986
CERTIORARI GRANTED OCTOBER 6, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

20 PM

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DOCKET ENTRIES

JEAN E. WELCH,

Plaintiff,

STATE DEPT. OF HIGHWAYS AND PUBLIC TRANSPORTATION, ET AL.,

Defendant.

Docket No. H 81-2593

DATE	NR.	PROCEEDINGS
10- 6-81	1	ORIGINAL COMPLAINT w/Jury DEMAND, filed.
10- 6-81		SUMMONS issued (4) on defts.
10-22-81	2	RETURN of Summons issued to The State of Texas served on 10-14-81, filed. dm
10-22-81	3	RETURN of Summons issued to The State Dept. of Highways and Public Transportation, served on 10-14-81, filed. dm.
10-22-81	4	RETURN of Summons issued to Drott Manufacturing Co., served on 10-15-81, filed. dm. Dd 10-22-81
10-28-81	5	RETURN of Summons issued to J.I. Case Co. served thru Michael D. Cucullu exec. on 10-9-81, filed. dm. DD 10-29-81
11- 2-81	6	ANSWER of Deft Drott Mnfg. Co., filed. dm DD 11-02-81
11- 6-81	7	Deft's MOTION to Dismiss, filed M/D Nov. 23, 1981 by clerk. DD 11-06-81
11-23-81	8	Pltf's MEMORANDUM IN OPPOSITION to Defts Motion to Dismiss, filed. dm DD 11-23-81
12-14-81	9	Pltf's MEMORANDUM OF LEGAL Authorities in support of defts' Motion to Dismiss, filed. dm
12-14-81	10	Deft's SUPPLEMENTAL MEMORANDUM in support of deft's Motion to Dismiss, filed. dm DD 12-15-81

DATE NR. PROCEEDINGS

1-12-82 11 Deft's INTERROGATORIES under Rule 33 of F.R.C.P. to Pltf, filed. dm DD 1-13-82

1-29-82 12 Pltf Atty's NOTICE OF CHANGE of address, filed. dm DD 1-29-82

3- 1 82 13 (GEC) MEMORANDUM AND ORDER, filed. Parties ntfd. dm Motion to dismiss of defts the State of Texas and Texas Dept. of Highways and Public Transportation is GRANTED.

3- 9-82 14 (GEC) DOCKET CONTROL ORDER, filed. Parties ntfd. mc/dm

1. Motions Jul 23, 1982
2. Pretrial/Settle. Conf. Aug. 30, 1982 3:00 p.m.
3. Trial Term Sep./Oct. 1982

3- 9-82 15 Pltf's MOTION TO AMEND Order Dismissing State Dept. of Highways and Public Transportation and the State of Texas, filed. dm M/D Mar. 29, 1982 by clerk.

3-12-82 16 Pltf's ANSWER to Interrogatories, filed. dm

3-26-82 17 RESPONSE of defts, The State of Texas and its State Dept. of Highways and Public Transportation to Jean E. Welch, Pltf's Motion to amend order dismissing defts the State of Texas and its State Dept. of Highways & Public Trans., filed. dm

4- 8-82 18 Deft Drott Mngt's NOTICE OF DEPOSITION set for Dr. Craig R. Ponder to be taken 30 days from receipt of service, filed. dm

4- 8-82 19 Deft Drott Mnfg's NOTICE OF DEPOSITION set for University of Texas Medical Branch Hospital to be taken 30 days after receipt of service, filed. dm DD 4-8-82

DATE NR. PROCEEDINGS

4-28-82 20 (GEC) ORDER, filed. Parties ntfd. dm

1. Pltf's motion to amend Court's order of 3-1-82 is DENIED. DD 4-28-82

4-29-82 21 DEPOSITION of Dr. R. Craig Ponder, filed. dm DD 5-6-82

6- 1-82 22 DEPOSITION of records from the University of Texas Medical Branch Hospital, filed. dm

7- 7-82 23 DEPOSITION of Jean Welch, filed. dm

8- 5-82 23A Pltf's MOTION FOR LEAVE to file Supplemental Complaint, filed. dm

8-10-82 24 Pltf's FIRST SET OF INTERROGATORIES to defts Drott Mnfg. Co., and JI Case Co., filed. dm

8-26-82 25 Deft's OBJECTIONS to Pltfs First Set of Interrogatories, filed. dm

8-26-82 26 JOINT MOTION f/CONTINUANCE, filed. dm

8-27-82 27 (GEC) ORDER, filed. Parties ntfd. dm

1. Pretrial Settlement Conf. Dec. 20, 1982 3:00 p.m.
2. Trial Term f/case is reset to Jan./Feb. 1983
3. Motion Deadline is Nov. 19, 1982.
4. Pt. Conf. Dec. 20, 1982, 3:00 p.m.

9-16-82 28 Deft Drott Manf.'s ANSWERS to pltf's first set of interrog., filed. aa

10- 7-82 29 Pltf's NOTICE OF DEPOSITIONS of Manual Collado, Richard Rodriguez and Captain Uwells, on 10-19-82, filed. rj Dkt'd 10-12-82

DATE NR. PROCEEDINGS

10-14-82 30 Defts' NOTICE OF DEPOSITIONS of Eugene A. McLendon and John Stephenson on 10-19-82, filed. rj Dkt'd 10-15-82

11- 1-82 31 Defts' RESPONSE to pltf's motion for leave to file supplemental comp., filed. aa Dtk'd 10-4-82

11-18-82 32 (GEC) ORDER filed. Parties ntfd. rj Dkt'd 11-19-82

Pltf's Motion for Leave to File Supplemental Complaint is GRANTED; deft file responsive pleadings w/i 15 days of date of this order.

11-18-82 33 Pltf's FIRST SUPPLEMENTAL COMPLAINT, filed. (No New Parties) rj Dkt'd 11-19-82

11-19-82 DEPOSITIONS of the Following:

34 John Stephenson, filed.

35 Eugene McLendon, filed.

36 Richard Rodriguez, filed.

37 Manuel Collado, filed.

38 Robert F. Ewels, filed.

11-19-82 Pltf's NOTICE OF DEPOSITIONS of the Following:

39 Joseph Wirkus on 12-2-82, filed.

40 Donald Tucek on 12-2-82, filed.

41 Rogert Josiger on 12-3-82, filed.

42 Robert G. Christensen on 12-3-82, filed.

12- 3-82 43 Deft Drott Manufacturing Co.'s FIRST SUPPLEMENTAL ANSWER, filed. rj Dkt'd 12-7-82

DATE NR. PROCEEDINGS

12-15-82 44 Pltf's MOTION FOR CONTINUANCE, filed rj (unopposed)

12-20-82 45 (GEC) ORDER, filed. Parties ntfd. rj

1. Pretrial conference scheduled 12-20-82, 3:00 p.m. continued to 2-28-83, 11:00 a.m.
2. Trial reset for March, 1983.

1-28-83 (GEC) *PRETRIAL CONFERENCE:* (Tape No. 12B)

Appearances: Pltf—Pearson
Defts—Warren Taylor

1. Parties will not settle case
2. Depositions of experts being taken this week
3. Case stand-by Mar. 14; ETT 4-5 days. rj Dkt'd 3-4-83

1-28-83 46 PRETRIAL-ORDER, filed. rj

A. Deft Drott Manufacturing & J. I. Case Co.'s Requested Jury Instructions and Interrogatories

B. Deft's Requested Voir Dire Questions Dkt'd 3-4-83

3-21-83 47 DEPOSITION of H. Boulter Kelsey, Jr., filed. rj

3-22-83 48 Pltf's REQUESTED SPECIAL INTERROGATORIES, filed. rj

3-22-83 49 Pltf's PROPOSED JURY INSTRUCTIONS, filed. rj

3-22-83 50 Defts' OBJECTIONS TO Pltf's Proposed Exhibits, filed. rj Dkt'd 3-23-83

3-22-83 51 Defts' MOTION TO DISMISS, filed. rj M/D April 11, 1983 by Clerk. Dkt'd 3-23-83

DATE NR. PROCEEDINGS

3-24-83 52 Pltf's SUPPLEMENTAL NOTE OF EVIDENCE, filed. rj Dkt'd 3-25-83

3-24-83 53 Pltf's MOTION IN LIMINE, filed, rj Dkt'd 3-25-83

3-24-83 54 Pltf's MEMORANDUM in Opposition to Defts' Motion to Dismiss, filed. rj Dkt'd 3-25-83

3-28-83 55(GEC) ORDER, filed. Parties ntfd. rj
Defts' Motion to Dismiss—DENIED. Dkt'd 4-5-83

3-28-83 56 Deft J. I. Case's MOTION IN LIMINE, filed. rj Dkt'd 4-5-83

3-28-83 57 (GEC) *1st DAY JURY TRIAL*, filed. (Rptr: Gary Bond)
Appearances: Pltf—Cuculla
Defts—Floyd
Jury selected & sworn. Pltf evidence commenced. ADJOURNED, return 3-29-83. rj Dkt'd 4-5-83

3-29-83 58 (GEC) STIPULATION FOR JURY LESS THAN SIX BUT NOT LESS THAN FIVE, filed. rj Dkt'd 4-5-83

3-29-83 59 (GEC) *2nd DAY JURY TRIAL*, filed. (Rptr: G. Bond)
Appearances: Same as 1st Day.
Pltf evidence cont'd. ADJOURNED, return 3-30-83, 9:00 a.m. rj Dkt'd 4-5-83

3-29-83 59 Deft J. I. Case Co.'s PROPOSED JURY INSTRUCTIONS, filed. rj Dkt'd 4-5-83

3-29-83 60 Deft J. I. Case Co.'s PROPOSED SPECIAL INSTRUCTIONS, filed. rj Dkt'd 4-5-83

3-30-83 61 (GEC) *3rd DAY JURY TRIAL*, filed. (Rptr: G. Bond)
Appearances: Same as 1st Day.
Pltf evidence cont'd. Pltf rests. Deft Motion

DATE NR. PROCEEDINGS

f/Directed Verdict—DENIED. Deft evidence. Deft rests. Courts charge. Closing arguments. Jury out to deliberate 4:05.

3-30-83 63 Deft J. I. Case Co.'s MOTION FOR DIRECTED VERDICT, filed. DENIED. rj Dkt'd 4-5-83

3-30-83 64 Defts' REQUESTED JURY INSTRUCTIONS & INTERROGATORIES, filed rj Dkt'd 4-5-83

* * * *

3-31-83 65 (GEC) *4th DAY JURY TRIAL*, filed. (Rptr: G. Bond)
Appearances: Same as first day.
Verdict returned in fabor of pltf. for $110,000.
ADJOURNED, mc rj Dkt'd 4-5-83

3-31-83 65 SPECIAL VERDICT FORM, filed. rj Dkt'd 4-5-83

* * *

3-30-83 66 (GEC) CHARGE TO THE JURY, filed. rj Dkt'd 4-5-83

3-31-83 67 LIST OF PLTFS' EXHIBITS, filed. rj Dkt'd 4-5-83

3-31-83 68 EXHIBIT LIST OF Deft Drott Manufacturing Co. & J. I. Case Co., filed. rj Dkt'd 4-5-83

4- 5-83 69 Pltf's RECEIPT FOR EXHIBITS, filed. rj Dkt'd 4-6-83

*4- 1-83 70 (GEC) FINAL JUDGMENT, filed. Parties ntfd. aa Dkt'd 4-6-83
Pltf take $191,387.00 from defts Drott Manuf. and J. I. Case Co. and costs of court are taxed to defts.

5- 2-83 71 Pltf's NOTICE OF APPEAL to Order entered March 1, 1982, filed. tf.
Fees NOT paid. Rec'd & Dkt'd 5-3-83

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NUMBER H-81-233-2593

JEAN E. WELCH,

Plaintiff,

vs.

STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION, A GOVERNMENTAL AGENCY OF THE STATE OF TEXAS, THE STATE OF TEXAS, DROTT MANUFACTURING COMPANY, A DIVISION OF J. I. CASE COMPANY, AND J. I. CASE COMPANY,

Defendants.

PLAINTIFF REQUESTS TRIAL BY JURY

ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Jean E. Welch, a person of full legal age and a resident of Port Bolivar, Galveston County, Texas, complaining of the State Department of Highways and Public Transportation, a governmental agency of the State of Texas, the State of Texas, Drott Manufacturing Company, a division of J. I. Case Campany, and J. I. Case Company for the following reasons, to-wit:

FIRST CAUSE OF ACTION

I

This is an action brought pursuant to Title 46, Section 688 of the United States Code, more commonly known as the Jones Act, for damages against the defendants, State Department of Highways and Public Transportation, a governmental agency of the State of Texas, and the State of Texas. This Honorable Court has jurisdiction of this

matter pursuant to Title 46, Section 688 of the United States Code.

II

The defendant, State Department of Highways and Public Transportation, is a governmental agency of the State of Texas and service of process may be made upon its Chairman, namely The Honorable A. Sam Waldrop, Highway Building, 11th and Brazos Street, Austin, Texas 78701.

III

The defendant, State of Texas, has an agent upon whom service of process may be made, namely The Honorable George W. Strake, Jr., Secretary of State, State Capitol Building, Austin, Texas 78701.

IV

On or about March 4, 1981, Jean E. Welch was employed by the State Department of Highways and Public Transportation and/or the State of Texas as a marine technician and by virtue of her duties was a seaman and a member of the crew of the vessels owned and operated by the defendant, State Department of Highways and Public Transportation or the State of Texas, which vessels provided ferry service from Galveston to Port Bolivar and therefore said vessels were engaged in navigation and commerce upon the navigable waters of the United States.

V

On or about March 4, 1981, the plaintiff was working in the course and scope of her employment for the defen-

dant State Department of Highways and Public Transportation or the State of Texas and was assigned duties which required her to assist in the loading of a barge over the side of a dock when suddenly and without warning the lifting device designed and manufactured by the defendant(s), Drott Manufacturing Company, a division of J. I. Case Company, and/or J. I. Case Company tipped over and crushed the plaintiff between the lifting devise and the guard rail of the dock. As a result of being crushed between the lifting device and the guard rail, plaintiff sustained severe, permanent and disabling bodily injuries to her feet, ankles, legs, abdomen, lower back and internal organs. The injuries have required plaintiff to undergo extensive medical treatment, hospitalization and surgery and will require plaintiff to undergo further medical treatment, hospitalization and surgery in the future

VI

The injuries to the plaintiff were directly caused, in whole or in part, by the negligence of her employer, State Department of Highways and Public Transportation or the State of Texas, in the following respects:

A. Defendant failed to furnish a safe place for plaintiff to perform her work;

B. Defendant failed to furnish safe and proper equipment for plaintiff to perform her assigned tasks;

C. Defendant's employee required plaintiff to stand in a position of danger between the lifting device and the guard rail in assisting in the operation of loading the barge into the water;

D. Defendant's employees failed to heed warnings concerning the maximum limitations of the lifting device;

E. Defendant's employees failed to use the "outriggers" attached to the lifting device as stabilization points before loading the barge into the water;

F. Defendant failed to furnish a qualified operator of the lifting device;

G. Defendant's employee was negligent by using the lifting device on a side load which exceeded the maximum limitations of the device;

H. Defendant's employee overextended the boom of the lifting device which caused it to tip over;

I. Defendant's employees failed to warn plaintiff of the imminent danger when the lifting device began turning over;

J. Defendant's employees were negligent by instructing your plaintiff to assist in the unloading of the barge into the water with her back to the lifting device.

VII

That the said incident and resulting injury to the plaintiff was due solely and entirely to the negligence of the plaintiff's employer, State Department of Highways and Public Transportation or the State of Texas.

SECOND CAUSE OF ACTION

And now plaintiff, Jean E. Welch, alleges a second cause of action against Drott Manufacturing Company, a division of J. I. Case Company, and J. I. Case Company for the following reasons, to-wit:

VIII

Jurisdiction for the second cause of action is vested in this Honorable Court by reason of Title 28, Section 1332 of the United States Code in that plaintiff is a resident of the State of Texas and Drott Manufacturing Company, a division of J. I. Case Company, is a foreign corporation organized under the laws of the State of Delaware and not authorized or chartered to do business in the State of Texas. Therefore, service of process upon Drott Manufacturing Company may be effected by serving the Honorable George W. Strake, Jr., Secretary of State, State Capitol Building, Austin, Texas 78701.

J. I. Case Company is a foreign corporation organized under the laws of the State of Delaware, authorized and doing business in the State of Texas, and its agent for service of process is M. H. Covey, 29th Floor, Tenneco Building, 1010 Milam Street, Houston, Texas 77002.

Further, the matter in controversy exceeds the sum of TEN THOUSAND DOLLARS ($10,000.00), exclusive of interest and costs.

IX

Upon information and belief, plaintiff alleges that the mobile crane which caused her injury was designed, manufactured and sold by Drott Manufacturing Company, a division of J. I. Case Company and J. I. Case Company.

X

On or about March 4, 1981, Jean E. Welch was employed as a marine technician by the State Department of Highways and Public Transportation, a governmental

agency of the State of Texas, or the State of Texas in Galveston, Galveston County, Texas.

XI

On or about March 4, 1981, plaintiff was assigned duties which required her to assist in lifting a work barge from a dock into the water and the lifting device which was used to accomplish this task was a mobile crane designed and manufactured by the defendants, Drott Manufacturing Company, a division of J. I. Case Company, and J. I. Case Company. As plaintiff was performing the assigned task, the mobile crane designed and manufactured by the defendants tipped over and crushed plaintiff between the crane and the guard rail of the dock where she was standing. The crane in question which caused injury to the plaintiff was manufactured and sold by the defendants, Drott Manufacturing Company and J. I. Case Company and there were no substantial changes in its condition from the time of the sale of the crane until the time of the injury to the plaintiff. The plaintiff contends that the product was defective and unreasonably dangerous and not suited for its intended purposes and therefore defendant is strictly liable to the plaintiff under the applicable products liability law of this state.

XII

Plaintiff further contends that the circumstances of her accident and resulting injuries could not have occurred without negligence on the part of the defendants, Drott Manufacturing Company and J. I. Case Company, and therefore, plaintiff pleads and relies herein on the doctrine of res ipsa loquitur.

XIII

Alternatively, plaintiff contends that her injuries were proximately caused by the negligence of the defendants (said negligence creating causes of action under strict liability as well as under common law negligence principles) in the following respects:

A. Failing to design, manufacture and distribute a mobile crane which was fit for its intended purposes;

B. Failing to design, manufacture and distribute a crane which provided for maximum recommended lifts from its side as well as its front and rear;

C. Failing to design, manufacture and distribute a crane which was properly stable without the use of its "outriggers";

D. Failing to design, manufacture and distribute a crane which met the permissible load ratings of the Occupational Safety and Health Administration;

E. Failing to design, manufacture and distribute a crane which could lift its maximum recommended weight;

F. Failing to design, manufacture and distribute a crane which met other applicable Federal standards for safety;

G. Failing to sufficiently warn distributors, consumers and the general public regarding the safety hazards of overloading or exceeding the maximum recommended capacity;

H. Failing to sufficiently warn distributors, consumers and the general public of safety hazards in the event that the "outriggers" were not used for a side lift;

I. Failing to sufficiently warn distributors, consumers and the general public of safety hazards connected with a side lift as opposed to a front or rear lift;

J. Failing to sufficiently warn distributors, consumers and the general public of safety hazards of utilizing the crane for a side lift, whether the "outriggers" were down or not.

XIV

As a direct and proximate result of the defective and dangerous conditions of the said crane, plaintiff sustained severe and permanently disabling bodily injuries to her feet, ankles, legs, abdomen, lower back and internal organs. The injuries have required plaintiff to undergo extensive medical treatment, hospitalization and surgery and will require plaintiff to undergo medical treatment, hospitalization and surgery in the future. Further, plaintiff has been caused to lose wages in the past and as a result of her injuries will be caused to lose wages in the future and her wage earning capacity has been severely and permanently impaired. As a result of her injuries, plaintiff has suffered severe pain, anguish and anxiety and will continue to suffer pain, anguish and anxiety for the remainder of her life.

XV

As a result of the injuries to the plaintiff, she has incurred medical and hospital expenses in excess of FIFTY THOUSAND DOLLARS ($50,000.00) at the present time and will in the future incur additional medical, hospital and surgical expenses, the exact amount of which cannot be determined at the present time, but plaintiff reason-

ably anticipates that they will be in excess of ONE HUNDRED THOUSAND DOLLARS ($100,000.00).

WHEREFORE, plaintiff Jean E. Welch prays that the defendants be cited to appear and answer and that after due proceedings that there be judgment rendered herein in favor of your plaintiff, Jean E. Welch, and against the defendants, State Department of Highways and Public Transportation, a governmental agency of the State of Texas, the State of Texas, Drott Manufacturing Company, a division of J. I. Case Company, and J. I. Case Company, for the full and true sum of TWO MILLION FIVE HUNDRED THOUSAND DOLLARS ($2,500,000.00), together with legal interest thereon as provided by law and for all costs of this proceeding and for any and all relief at law or in equity to which the plaintiff, Jean E. Welch, may show herself justly entitled.

Respectfully submitted,

/s/ Michael D. Cucullu
Bar No. 05201600
Two Houston Center
Suite 1016
Houston, Texas 77010
(713) 654-1669
Attorney for Plaintiff,
Jean E. Welch

PLEASE SERVE:

State Department of Highways
and Public Transportation,
through its Chairman,
Honorable A. Sam Waldrop
Highway Building
11th and Brazos Streets
Austin, Texas 78701

State of Texas,
through its Secretary of State,
Honorable George W. Strake, Jr.
State Capitol Building
Austin, Texas 78701

Drott Manufacturing Company,
a division of J. I. Case Company,
through the Secretary of State,
Honorable George W. Strake, Jr.
State Capitol Building
Austin, Texas 78701

J. I. Case Company,
through its registered agent,
M. H. Covey
29th Floor, Tenneco Building
1010 Milam Street
Houston, Texas 77002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NUMBER H81-2593

JEAN E. WELCH,

Plaintiff,

v.

STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION, A GOVERNMENTAL AGENCY OF THE STATE OF TEXAS, THE STATE OF TEXAS, DROTT MANUFACTURING COMPANY, A DIVISION OF J. I. CASE COMPANY, AND J.I. CASE COMPANY,

Defendants.

PLAINTIFF REQUESTS TRIAL BY JURY

MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW State Department of Highways and Public Transportation, a governmental agency of the State of Texas, and the State of Texas, both so named among the Defendants in the Plaintiff's Original Complaint, represented herein by the Attorney General of Texas and move the Court under Rule 12(b) of the Federal Rules of Civil Procedure as follows:

I

To dismiss this action as to State Department of Highways and Public Transportation and the State of Texas on the grounds of the immunity afforded in Federal Courts to both the State of Texas and its Department of Highways and Public Transportation under the Eleventh Amendment to the Constitution of the United States. This immunity has not been waived.

II

To dismiss this action as to the State of Texas and its Department of Highways and Public Transportation because the Complaint fails to state a claim against the State or its Department of Highways and Public Transportation upon which relief can be granted for the following reasons:

The First cause of action of Plaintiff's Original Complaint seeks a money judgment in this honorable court under the jurisdiction of Title 46, Section 688 of the United States Code, commonly known as the Jones Act against the State of Texas and its Department of Highways and Public Transportation for damages for Plaintiff's injuries as an employee, caused by negligence of Plaintiff's employer, the State of Texas or its Department of Highways and Public Transportation.

Both the State of Texas and its Department of Highways and Public Transportation have immunity from suit by State employees without consent of the State and, unless waived, immunity from liability in Tort. Consent to suit has not been given and immunity from Tort liability in the action Plaintiff brought has not been waived.

WHEREFORE, PREMISES CONSIDERED, Defendants, the State of Texas and its Department of Highways and Public Transportation pray that this Motion be set for hearing, that upon such hearing the Court order that this action, as to the State of Texas and the State Department of Highways and Public Transportation, be dismissed, adjudging all costs herein against the Plaintiff.

Respectfully submitted,

MARK WHITE
Attorney General of Texas
/s/ Joe D. Jarrard, Jr.
Assistant Attorney General
P.O. Box 5075
Austin, Texas 78763
(512) 475-8473
Bar Card No. 10580000

CERTIFICATE OF SERVICE

It is hereby certified that copies of the foregoing Motion as well as the accompanying proposed order have been deposited this date in the United States Mail, Certified Mail, Return Receipt Requested, address to Michael D. Cucullu, Plaintiff's attorney, Two Houston Centre, Suite 1016, Houston, Texas 77010.

SIGNED November 4th, 1981.

/s/ Joe D. Jarrard, Jr.
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. NO. H-81-2593

JEAN E. WELCH,

vs.

STATE DEPARTMENT OF HIGHWAYS AND
PUBLIC TRANSPORTATION, ET AL.

MEMORANDUM AND ORDER
(Filed March 1, 1982)

Before the Court is a motion to dismiss filed by Defendants the State of Texas and its State Department of Highways and Public Transportation. For the reasons indicated below, the Court is of the opinion that this motion should be GRANTED. The Court therefore ORDERS that the Jones Act claims of Plaintiff against the State of Texas and its Department of Highways and Public Transportation are DISMISSED with prejudice.

Plaintiff brought this suit in admiralty against the State of Texas and its State Department of Highways and Public Transportation (DHPT) pursuant to the Jones Act, 46 U.S.C. § 688, and against two private companies pursuant to common law negligence and strict liability. Plaintiff alleges in her complaint that she was employed as a seaman by the DHPT or the State when she was crushed between a mobile crane and the dock where she was standing in the course and scope of her employment as a marine technician on or about March 4, 1981.

The State and the DHPT have filed a motion to dismiss for want of subject matter jurisdiction claiming the protections of the eleventh amendment and the doctrines

of sovereign immunity and governmental immunity in tort. Plaintiff responded to this motion by arguing that the Defendants waived these defenses to suit by operating a ferry service in commerce over navigable waters, which is within a federally regulated sphere of activity. The State and the DHPT contend, however, that they have neither expressly nor impliedly consented to suit and, further, that the exclusive remedy provision of the workers' compensation statute precludes suit under the Jones Act.

The eleventh amendment provides that states may not be sued in federal courts by citizens of another state or citizens or subjects of a foreign state. U.S. CONST. amend. XI. This protection from suit has been construed to preclude as well a suit against a state by a citizen of that state. *Great Northern Life Ins. Co. v. Read*, 332 U.S. 47, 64 S. Ct. 873 (1944); *Hans v. Louisiana*, 134 U.S. 1 (1890). The eleventh amendment immunity also clearly encompasses suits in admiralty. *Ex Parte State of New York*, 256 U.S. 490 (1920); *Mifsud v. Palisades Geophysical Institute, Inc.*, 484 F. Supp. 159 (S.D. Tex. 1980).

The Fifth Circuit addressed the status of eleventh amendment immunity most recently in *Karpovs v. Mississippi*, 663 F.2d 640 (5th Cir. 1981) and explained several principles that the Court finds directly relevant to this action:

> [As] a general matter suits against the state for prospective injunctive relief are permitted in limited circumstances, *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), but suits against the state treasury are absolutely barred. *Edelman v. Jordan* [415 U.S. 651, 94 S. Ct. 1347 (1974)]. . . . [This] immunity extends beyond the state and encompasses state agencies, officials and employees "when the action is in essence one for the recovery of money from the state . . . " *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464, 65 S. Ct. 347, 350, 89 L. Ed. 389 (1945). In such cases, "the state is the real, substantial party in interest and is entiled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Id.; Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 66 S. Ct. 745, 90 L. Ed. 862 (1946). [Finally], the eleventh amendment applies unless a federally created right is at issue, or a state has either consented to suit in federal court or has waived its eleventh amendment shield. *Parden v. Terminal Railroad Co.*, 377 U.S. 184, 84 S. Ct. 1207, 12 L. Ed.2d 233 (1964).

Id. at 643-44 (footnote omitted). Because Plaintiff seeks a monetary recovery that would be paid from the state treasury, *Karpovs* definitively precludes Plaintiff's argument that even if the State were entitled to assert eleventh amendment immunity, the DHPT would not be similarly protected.

Plaintiff's opposition to this motion to dismiss relies heavily on the Supreme Court's *Parden* decision. In *Parden*, the Supreme Court found that a state could waive its eleventh amendment immunity by merely operating within a federally regulated sphere. Although the federally regulated sphere in *Parden* was interstate railroads, lower courts later used the *Parden* reasoning to find that a state waived its immunity to the Jones Act by operating within the federally regulated maritime sphere. *Rivet v. East Point Marine Corp.*, 325 F. Supp. 1265, 1267 (S.D. Ala. 1971), *ovr'd, Benniefield v. Valley Barge Lines*, 472 F. Supp. 314, 317 (S.D. Ala. 1979); *Huckins v. Board of*

Regents of the University of Michigan, 263 F. Supp. 622, 623 (E.D. Mich. 1967); *Cocherl v. Alaska,* 246 F. Supp. 328, 330 (D. Alaska 1965).

Subsequent to these decisions, however, the Supreme Court decided *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare,* 411 U.S. 279, 93 S. Ct. 1614 (1973). In *Employees,* the Court refused to extend *Parden* to cover every piece of legislation passed by Congress pursuant to its commerce power. Rather, *Employees* added an additional requirement to the *Parden* test for determining whether a state has implicitly waived its eleventh amendment immunity by operating within a federally regulated sphere: the private litigant must show that Congress expressly provided that the private remedy would be applicable to the States. 411 U.S. at 286, 93 S. Ct. at 1619.

Later that same year, the Fifth Circuit applied this new test to a suit brought under the Bridge Act of 1906, 33 U.S.C. § 491, and found that eleventh amendment immunity afforded the state agency being sued a complete defense. *Intracoastal Transportation, Inc. v. Decatur County, Georgia,* 482 F.2d 361 (5th Cir. 1973). This reasoning was followed by the Fifth Circuit in 1981 when it reaffirmed its interpretation of the Bridge Act of 1906 and extended its decision to find no implicit waiver of sovereign immunity when the cause of action was alternatively brought pursuant to the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 401. *Freimanis v. Sea-Land Service, Inc.,* 654 F.2d 1155, 1160 (5th Cir. 1981). The Fifth Circuit's decision in *Karpovs, supra,* was another reaffirmation that these two pieces of federal

legislation did not implicitly waive the states' eleventh amendment immunity.

Freimanis relied to a great extent on the Supreme Court's latest pronouncement on whether a state can implicitly waive its eleventh amendment immunity. In *Quern v. Jordan,* 440 U.S. 332, 345, 99 S. Ct. 1139, 1147 (1979), the Court held that the Civil Rights Act of 1871, 42 U.S.C. § 1983, did not abrogate the eleventh amendment immunity of the states. While distinguishing other cases where this immunity was held to be waived, *Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S. Ct. 2666 (1976) (Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e) and *Hutto v. Finney,* 437 U.S. 678, 98 S. Ct. 2482 (1978) (Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. § 1988), the Supreme Court noted that section 1983 neither explicitly swept away the states' eleventh amendment immunity nor had a history that focused directly on the question of state liability and demonstrated a clear Congressional decision to abrogate that immunity. 440 U.S. at 345, 99 S. Ct. at 1147.

The wording of the Jones Act itself does not include an express decision by Congress to abrogate the eleventh amendment immunity of the states and Plaintiff has not demonstrated through the legislative history of this statute that Congress had a specific intent to allow private parties to bring suit against a state. The Court therefore finds that neither the State nor the DHPT have implicitly waived their eleventh immunity by operating within a sphere arguably covered by the Jones Act.

Plaintiff argues alternatively that the State has expressly consented to be sued and has thus waived its elev-

enth amendment protection. The Texas Torts Claims Act allows suit against the State for personal injuries proximately caused by the negligence of any officer or employee acting within the scope of employment if the injury arose from "the operation or use of a motor driven vehicle and motor driven equipment." TEX. REV. CIV. STAT. ANN. art. 6252-19 § 3 (Vernon Supp. 1980-81). Section 4 of the Texas Torts Claims Act specifically waives the State's immunity from suit to the extent of the "liability created by Section 3" and grants permission to all claimants to sue the State of Texas for "all claims arising" under the Act. TEX. REV. CIV. STAT. ANN. art. 6252-19 § 4 (Vernon 1970).

The State of Texas then attempts to limit this waiver of immunity in section 19 of the Act, which provides that a governmental unit carrying worker's compensation is entitled to the privileges and immunities granted by the Workers' Compensation Act. The DHPT carries worker's (sic) compensation insurance, under a statute specifically providing for such. TEX. REV. CIV. STAT. ANN. art 6674s (Vernon 1977). Section 3 of this statute limits employees to this exclusive remedy for injuries sustained while working within the course of their employment.

Plaintiff argues that the exclusive remedy provision in the workers' compensation statute cannot preclude her recovery under the Jones Act and bases this argument on *Roberts v. City of Plantation*, 558 F.2d 750 (5th Cir. 1977). In *Roberts*, the Fifth Circuit held that if the plaintiff could prove himself entitled to Jones Act recovery, the exclusive remedy provisions of Florida's workers' compensation statutes could not oust the federal court

of its jurisdiction. Similarly, the Fifth Circuit held in *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978), *cert. denied*, 442 U.S. 909, 99 S. Ct. 2820 (1979), that the Louisiana statute providing that workers' compensation would be the exclusive remedy for an injured oil field maintenance and construction worker could not result in a dismissal of a Jones Act suit. *See also Ledoux v. Petroleum Helicopters, Inc.*, 609 F.2d 824 (5th Cir. 1980).

In neither *Roberts* nor *Thibodaux*, however, could the defendants assert an eleventh amendment immunity defense. These cases are therefore clearly distinguishable from the present action. A state is entitled to eleventh amendment immunity from the Jones Act and thus may be sued only with its consent, unlike a private defendant. Although Texas chose to waive its immunity through the Texas Tort Claims Act, it expressly limited that waiver when workers' compensation coverage is provided.

The Court therefore finds that the exclusive remedy provision in the workers' compensation statute for employees of the DHPT also precludes Plaintiff's Jones Act suit against her employer and the State of Texas. *See Mifsud v. Pal ides Geophysical Institute, Inc.*, 484 F. Supp. 159 (S.D. Tex. 1980); *Lyons v. Texas A&M University*, 545 S.W.2d 56 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.).

In conclusion, the State and DHPT are protected from Plaintiff's Jones Act claim against them in this Court by operation of eleventh amendment immunity. The Court therefore finds it unnecessary to address Defendant's alternative theories under the separate doctrines

of sovereign immunity and governmental immunity in tort.

The motion to dismiss of Defendants the State of Texas and the Texas Department of Highways and Public Transportation is hereby GRANTED.

SIGNED and ENTERED this 1st day of March 1982.

/s/ George E. Cire
UNITED STATES
DISTRICT JUDGE

No. 85-1716

In The
Supreme Court of the United States
October Term, 1985

JEAN E. WELCH,

Petitioner,

v.

STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION and THE STATE OF TEXAS,

Respondents.

ORIGINAL BRIEF FOR THE PETITIONER

MICHAEL D. CUCULLU
STEINBURG & BRYANT
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Suite 3600
Houston, Texas 77010
(713) 654-7800

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION AND THE STATE OF TEXAS ARE IMMUNE FROM A JONES ACT SUIT IN FEDERAL COURT BY A STATE EMPLOYED SEAMAN BY OPERATION OF THE ELEVENTH AMENDMENT OF THE U.S. CONSTITUTION.

2. WHETHER THE STATE OF TEXAS HAS WAIVED ITS IMMUNITY TO A JONES ACT SUIT BY A STATE EMPLOYED SEAMAN.

PARTIES TO THIS PROCEEDING

Pursuant to Rule 34(1)(b), the following is a list of all parties to this proceeding:

1. JEAN ERICKSON WELCH, PETITIONER
2. STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION, RESPONDENT
3. STATE OF TEXAS, RESPONDENT

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1. Reproduced in the Joint Appendix to the Petition for Writ of Certiorari, pp. 75a - 81a.

2. Reproduced in the Joint Appendix to the Petition for Writ of Certiorari, pp. 49a - 74a.

3. Reproduced in the Joint Appendix to the Petition for Writ of Certiorari, pp. 1a - 46a.

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JURISDICTION

Jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

An appeal was timely taken from the dismissal of this action by the U.S. District Court. The District Court granted a Motion to Dismiss on March 1, 1982. (J.A. p.2, NR 13). The District Court then denied Welch's Motion to Amend the Order Dismissing the State Department of Highways and Public Transportation in order to allow immediate appeal pursuant to 28 U.S.C. 1292(b). (J.A., p.3, NR 20).

Final Judgment was thereafter entered by the District Court on April 1, 1983 (J.A., p. 7, NR 70). Notice of Appeal to the U.S. Court of Appeals was timely filed on May 2, 1983 (J.A., p.7, NR 71).

The U.S. Court of Appeals rendered its decision on August 27, 1984 and an en banc suggestion was granted on October 31, 1984.

The en banc U.S. Court of Appeals decided this case on January 22, 1986 and a Petition for Writ of Certiorari was filed on April 21, 1986. Certiorari was granted on October 6, 1986.

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CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment XI.

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States Citizens of another State or by Citizens or Subjects of any Foreign State.

U.S. Constitution, Article III, Section 2

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall

> be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.
>
> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

———o———

STATUTES

46 U.S.C. § 688

> any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in case of personal injury to railroad employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action on all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

45 U.S.C. § 51

> Every common carrier by railroad while engaging in commerce between any of the several States or Terri-

tories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representatives for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Tex. Rev. Civ. Stat. Ann., art. 6252-19, Sec. 3

Each unit of government in the state shall be liable for money damages for property damage or personal injuries or death when proximately caused by the negligence or wrongful act or omission of any officer or employee acting within the scope of his employment or office arising from the operation or use of a motor-driven vehicle and motor-driven equipment . . . under circumstances where such officer or employee would be personally liable to the claimant in accordance with the law of this state, or death or personal injuries so caused from some condition or some use of tangible

property, real or personal, under circumstances where such unit of government, if a private person, would be liable to the claimant in accordance with the law of this state.

Tex. Rev. Civ. Stat. Ann., art. 6252-19, Section 4

To the extent of such liability created by Section 3, immunity of the sovereign to suit, as heretofore recognized and practiced in the State of Texas with reference to units of government, is hereby expressly waived and abolished, and permission is hereby granted by the legislature to all claimants to bring suit against the State of Texas, or any and all other units of government covered by this Act, for all claims arising hereunder.

Tex. Rev. Civ. Stat. Ann., art. 6674s, Section 6

Sec. 6. Employees of the Department and parents of minor employees shall have no right of action against the agents, servants, or employees of the Department for damages for personal injuries nor shall representatives and beneficiaries of deceased employees have a right of action against the agents, servants, or employees of the Department for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the Department as is provided in this law. All compensation allowed herein shall be exempt from garnishment, attachment, judgment, and all other suits or claims, and no such right of action and no such compensation and no part thereof nor of either shall be assignable, except as otherwise herein provided, and any attempt to assign the same shall be void.

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STATEMENT OF THE CASE

Petitioner Jean Welch was injured on March 4, 1981 while working as a marine technician on the ferry landing dock at Galveston, Texas. She sued both her employer, the State Depuartment of Highways and Public Transportation and the State of Texas in federal court under the Jones Act. She also sued the manufacturer of the crane, Drott Manufacturing Co., a division of J.I. Case Company in a products liability action.

The Highway Department of the State of Texas operates on a twenty-four hour basis a free automobile and passenger ferry between Point Bolivar and Galveston, Texas, across the waters which constitute the entrance to the Port of Houston. The length of the ferry boat journey is approximately three miles. Without a ferry boat, a person wishing to travel between Port Bolivar and Galveston would have to drive approximately 130 miles. Petitioner was an employee of the State Department of Highways and Public Transportation and in the scope of her employment when she was injured. Petitioner alleged seaman status in her Original Complaint (J.A., p. 9, para. IV Original Complaint) and her status is not an issue.

Petitioner's employer was insured under the Texas Worker's Compensation Act at all relevant times herein.

The circumstances of Petitioner's injuries are that while working on the dock she was instructed by her foreman to assist in raising a work barge from the waters below to the dock by means of a mobile crane. The mobile crane, operated by a co-employee, overturned because its maximum load rating was exceeded and the "outriggers" were not used. As a result, Petitioner was crushed by the mobile

crane into the guardrail on the dock. (J.A. p. 10, para. V. of Original Complaint). The products liability cause of action was tried to verdict and the judgment was satisfied and therefore is not part of this appeal.

Petitioner's Jones Act claim was dismissed by the District Court on the assertion of Eleventh Amendment immunity by the State of Texas and the State Department of Highways and Public Transportation. (J.A. to Petition for Writ of Certiorari, pp. 75a - 81a). Petitioner appealed and the U.S. Court of Appeals for the Fifth Circuit reversed the District Court in its decision of August 27, 1984. (J.A. to Petition for Writ of Certiorari, pp. 49a - 74a). Thereafter, the Fifth Circuit granted the application of Respondents for en banc hearing and affirmed the District Court dismissal on January 22, 1986 (J.A. to Petition for Writ of Certiorari, pp. 1a - 46a).

Petitioner applied for a writ of certiorari on April 21, 1986 and her Petition for Writ of Certiorari was granted on October 6, 1986.

———o———

SUMMARY OF THE ARGUMENT

Petitioner Welch argues that she is entitled to proceed with her Jones Act suit in federal court on the grounds that the Jones Act preempts the state's immunity granted by the Eleventh Amendment because the Constitution grants the exclusive regulation of admiralty and maritime matters to the Congress by Article III, Section 2. Furthermore, in a *Pardon* approach, Petitioner suggests that the

State of Texas, by operation of navigable vessels and employment of seaman such as Welch, have constructively consented to the application of the Jones Act and cannot assert Eleventh Amendment immunity as a defense. Petitioner suggests that the Constitutional grant of exclusive regulation of maritime matters to Congress abrogates the Eleventh Amendment immunity and that the Jones Act remedy does apply to the states in federal court. To hold otherwise would provide Petitioner a right without a remedy.

Alternatively, Petitioner argues that the statutory provisions of the State of Texas clearly waive its immunity. The waiver of immunity by the State of Texas in Section 4 of Article 6252-19 of the Texas Revised Civil Statutes is a waiver of Eleventh Amendment immunity and dictates a reversal by this Court.

———o———

ARGUMENT

The Merchant Marine Act of 1920 (commonly referred to as the Jones Act) provides in applicable part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . .
>
> 41 Stat. 1007; 46 U.S.C. 688.

Pursuant to the Jones Act, Petitioner Welch sought damages against her employer, the Texas State Department of Highways and Public Transportation for injuries resulting from the negligence of a co-employee. Her suit was dismissed by the District Court (J. Cire) and the dismissal was affirmed by a divided Fifth Circuit en banc court on the ground that the state is immune from an employees' Jones Act claim in federal court by operation of the Eleventh Amendment to the United States Constitution.

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of theUnited States Citizens of another State or by Citizens or Subjects of any Foreign State.
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> U.S. Constitution, Amendment XI.

The issue which arises between the competing interests of the state employed seaman by virtue of her Jones Act rights and the state by virtue of its Eleventh Amendment immunity must be resolved favorably to the Petitioner for the following reasons: (1) the regulation of maritime policy is entirely vested in the federal government pursuant to the plenary power granted to Congress by Article III, § 2 of the Constitution; (2) the states' immunity has been abrogated by entry into the federally regulated sphere of admiralty and maritime activity; and (3) the Jones Act therefore abrogates the Eleventh Amendment immunity of the state as to a state employed seaman.

1. HISTORY AND PURPOSE OF THE ELEVENTH AMENDMENT

The Eleventh Amendment stands for the proposition that a Citizen may only sue a State in Federal Court with that State's consent. Enacted in response to *Chisholm v.*

Georgia, 2 U.S. (2 Dall.) 419 (1793) the purpose of the amendment was to protect the fiscal integrity of the several states by prohibiting the imposition of money judgments against the states by Federal Courts.[1] The immunity afforded the states is based upon the common-law doctrine of sovereign immunity and has long been considered an essential attribute to the States.

> That a state may not be sued without it's consent is a fundamental rule of jurisprudence having so import- of the United States that it has become established by ant a bearing upon the construction of the Constitution repeated decisions of this Court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given; not one brought by citizens of another state, or by citizens or subjects of a foreign state, because of the Eleventh Amendment; and not even one brought by it's own citizens, because of the fundamental rule of which the amendment is but an exemplification.
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> *In re State of New York,* 256 U.S. 490, 497 (1921) and cases cited therein.

Moreover, it is well settled that the Eleventh Amendment immunity afforded states from suits by foreign citizens has been interpreted to include suits against a state by a citizen of this own state. *Hans v. Louisiana,* 134 U.S. 1 (1890), *Great Northern Life Insurance Company v. Read,* 332 U.S. 47, 64 S.Ct 873 (1944).

Additional expansion beyond the explicit language of the amendment has held that sovereign immunity also applies

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[1]*Jagnandan v. Giles,* 538 F.2d 1166 (5th Cir. 1976), cert. denied, 432 U.S. 910 (1977).

to suits by a foreign nation. *Monaco v. Mississippi,* 292 U.S. 313, 54 S.Ct. 745 (1934).

The intention of the framers as to maritime matters first underwent analysis and interpretation in *Ex Parte Garnett,* 141 U.S. 1, 11 S.Ct. 840, 35 L.Ed. 631 (1891). Therein, the Court stated:

> . . . the Constitution must have referred to a system of law co-extensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution arrived or all subjects of commercial character affecting the intercourse of the states with each other or with foreign states.
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> *Ex Parte Garnett,* 141 U.S. 1, 13 (1891)

There have been no departures from the conclusion of the court in Garnett that uniformity and consistency concerning maritime law is required and is solely within the ambit of Congress.

In *Workman v. Mayor, Alderman, and City of New York,* 179 U.S. 553, 21 S.Ct. 2112, 45 L.Ed. 314 (1900) this Court emphasized the need for exclusive federal regulation in admiralty and maritime activities, notwithstanding the fact that such maritime activities were private or state operated. As Article III, § 2 of the Constitution grants judicial power of the United States "to all cases of admiralty and maritime jurisdiction", there seems little room for doubt that the *Garnett* and *Workman* decisions coincide with the intentions of the framers.

The majority holding for the en banc Fifth Circuit by Judge Williams focuses on the absence of expressed state

waiver of immunity in the present case, and dismisses somewhat categorically the holding in *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917). *Jensen* stands for the proposition that state workers' compensation statutes cannot apply to injuries occuring on navigable waters. The majority concludes that the Respondent herein may enact a state workers' compensation scheme for its maritime employees.

> This leaves the state free to provide workers' compensation for injuries to its own employees as against a suit in federal court. Otherwise, there would be a federally imposed remedy abrogating sovereign immunity without expressed intention to impose such a remedy. In terms this is inconsistent with *Atascadero* and also the principle of the political control of federal regulation by the states acting through the Congress which the Court emphasized in the *Garcia* case.
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> *Welch v. State Dept. of Highways and Public Transp.*, 780 F.2d 1268, 1274 (5th Cir. 1986).

If, in fact, a state may freely enact such legislation requiring its maritime employees to submit to a state workers' compensation scheme, (as the majority concludes) does the plenary power of Article III, § 2 of the Constitution remain intact? Petitioner suggests that the conclusion of the majority that "such an unconstitutional conditions analysis [of *Southern Pacific v. Jensen*] *is not relevant* here" ignores the intent of the framers to establish a uniform maritime policy in the Congress and contradicts well established principles of federalism under the plenary power over maritime and admiralty matters. Congress' power to regulate maritime activities arises from Article I, § 8 of the Constitution which grants the power

> . . . to make all ways which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or offices thereof.
>
> U.S. Constitution, Art. I, § 8

The application of immunity to the state in maritime policy and regulation has consistently been denied by this Court. In *Southern Pacific v. Jensen,* 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917), this court stated:

> it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country.
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> *Id.*, at 215.

Further consistent denial of the state immunity was set forth in *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834 (1920) wherein the Court stated "the necessary consequence of [any other conclusion] would be destruction of the very uniformity in respect of maritime matters which the Constitution was designed to establish." *Id.*, at 156.

Moreover, in *State of Washington v. Dawson & Co.,* 264 U.S. 219, 44 S.Ct. 302, 68 L.Ed. 646 (1924) this Court affirmed the principle of federal preemption in maritime and admiralty matters by its holding that state statutes may not contravene federal policies or regulations such as this Respondent seeks herein.

> . . . well established is the rule that state statutes may not contravene an applicable act of Congress, or affect the general maritime law. . . . No such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works a material prejudice to the characteristic features of the general maritime

law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations.

Id., at 244.

Respondent seeks to shield itself from the suit of Petitioner by asserting its sovereign immunity as a substantive and jurisdictional defense. Construction of the shield is sought in the decisions of *Employees of the Department of Public Health & Welfare v. Missouri Department of Public Health & Welfare,* 411 U.S. 279, 93 S.Ct. 1614, 34 L.Ed. 2d. 251 (1973), *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 2d 662 (1974), *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. —, 105 S.Ct. 1005, 83 L.Ed. 2d 1016 (1985), and *Atascadero State Hospital & California Dept. of Mental Health v. Douglas James Scanlon,* 473 U.S. —, 105 S.Ct. 3142, 87 L.Ed. 2d 171 (1985). Assuming *arguendo* that these enumerated decisions relied upon the Respondent and the en banc majority of the Fifth Circuit compel this Court to affirm the dismissal of the suit of Petitioner, the result constitutes a derogation of the plenary power grant to Congress and carves a judicial exception for state employed seamen under the Jones Act. It is abundantly clear that the Jones Act was enacted pursuant to Congress' maritime and admiralty powers. *Panama Railroad Co. v. Johnson,* 264 U.S. 375, 44 S.Ct. 391, 68 L.Ed. 748 (1924); *Engel v. Davenport,* 271 U.S. 33, 46 S.Ct. 410, 70 L.Ed. 831 (1926); *In Re Health,* 144 U.S. 92, 12 S.Ct. 615, 36 L.Ed. 358 (1892). It is equally clear that the result as reached by the Fifth Circuit is not permissible unless the federal regulation of admiralty and maritime matters is to be abrogated by the judiciary. In *Ex Parte Garnett,* 141 U.S. 1, the Court said:

> The Constitution extends the judicial power of the United States to 'all cases, of admiralty and maritime jurisdiction,' and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the National Legislature, and not in the State Legislature.
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> *Id.*, at 14.

There can be no compliance with the required federally regulated maritime activity except by reversal of this matter. With the sole exception of *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed. 2d 804 (1959), there have been no decisions which have interpreted Congress' plenary power over maritime matters. Even the watermark decision in *Parden v. Terminal Railway Co.,* 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed. 2d 233 (1964) was a commerce clause case which concluded that state immunity was abrogated by the entry of Alabama into a federally regulated sphere of activity which provided FELA remedies to employees. Thus, the majority opinion of the en banc Fifth Circuit is a departure from the standard which grants Congress exclusive power over admiralty and maritime matters and should be reversed.

The Fifth Circuit opinion that *Parden* and *Petty* are no longer viable is not supported by more recent decisions on state immunity. Although the degree of congressional intent required to overcome the Eleventh Amendment shield in non-maritime areas has vacillated in recent years — there has been no rejection of or retreat from the principle that maritime and admiralty matters are within the exclusive control of Congress. Application of this principle to the contrasting decisions relied upon by the Fifth Circuit majority do not compel a rejection or retreat from the stated principle.

For instance, in *Employees v. Dept. of Public Health and Welfare,* 411 U.S. 279 (1973) the Supreme Court distinguished *Parden* and declined to extend its rationale to the Fair Labor Standards Act.[2]

> The dramatic circumstances of the Parden case, which involved a rather isolated state activity can be put to one side . . . It is true that, as the Court said in Parden, 'the states surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.' 377 U.S., at 191, 84 S.Ct., at 1212. But we decline to cover every exercise by Congress of its commerce power, . . .
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> *Id.*, at 285, 286-287.

The majority opinion below misconstrues the decision in *Employees* as a limitation on the power of Congress to act within the realm of admiralty and and maritime matters.[3] Nowhere does *Employees* suggest any application of the decision to the plenary power granted Congress over admiralty and maritime matters. However, the Court in *Employees* went to great lengths to distinguish an isolated proprietary activity as found in *Parden* from the governmental function in *Employees.* The decision in *Employees* followed *Maryland v. Wirtz,* 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968) which held that Congress could regulate the states as an employer by imposing minimum

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[2]29 U.S.C., 201 et seq; (1938, as amended).

[3]Circuit Judge Williams' majority opinion states: "But the broad sweep of the *Parden* decision, although it has not been overruled has overtly been limited by later decisions as its full implications have surfaced . . . because in the *Missouri Public Health and Welfare* case the Supreme Court modified *Parden* by holding that Congress must express itself in "clear language" to cause a private federal remedy for employees to be applicable to state employees. *Welch,* at p. 1270.

wages on them. The approach in *Employees* reflects the concern of this Court undertaken to establish a criteria for determining circumstances to find that federal preemption or congressional abrogation is appropriate. In an effort to set forth this test, the Court first required the "clear statement" within the statute itself to the states, presumably in the Act. Undoubtedly the Court had the option to overrule *Parden*—but did not. Nor should the significance of this passed opportunity be lost in that this Court decided *Edelman v. Jordan,* 415 U.S. 651 (1974) just one year after *Employees.* Once again presented with an opportunity to overturn or discredit the *Parden* decision, the Court declined. *Edelman* arose from Plaintiffs seeking injunctive relief to compel future compliance and monetary payments of withheld benefits from a state-administered, federally subsidized program[4] known as the AABD. Justice Rehnquist wrote for the majority that:

> Both *Parden* and *Employees* involved a congressional enactment which by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included states or state instrumentalities. Similarly, *Petty v. Tennessee-Missouri Bridge Commission, supra,* involved congressional approval, pursuant to the Compact Clause, of a compact between Tennessee and Missouri, which provided that each compacting State would have the power 'to contract, to sue, and be sued in its own name.' The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation

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[4]42 U.S.C. §§ 801-805, Aid to the Aged, Blind and Disabled.

> in the program authorized by Congress had in effect consented to the abrogation of that immunity.
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> *Edelman,* at 672.

Mere state participation in a federally-subsidized program does not establish consent by the states to suit in federal court in view of the Eleventh Amendment. *Edelman,* at 673. The distinction between *Edelman* and the *Parden* and *Petty* decisions remained intact. The majority opinion for the Fifth Circuit glossed over *Edelman* as supporting the proposition that "clear language" by Congress is the criteria for abrogation of immunity in the instant case. This conclusion is erroneous.

Following *Employees* and *Edelman,* the Supreme Court overruled *Wirtz* in *National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976) and held unconstitutional Congress' attempt to apply the Fair Labor Standards Act to most state and municipal employees (subsequent to the 1974 amendment which provided application of the law to those employees). Prior to *Wirtz,* the Fair Labor Standards Act applied to state and municipal workers only in hospitals, institutions and schools. By the 1974 amendment to the Fair Labor Standards Act, Congress provided application of the Act to include "public agencies" as employers and defined a public agency to include "the Government of the United States; the government of a state or political subdivisions thereof; . . ."[5] The Supreme Court reasoned that "Congress may not exercise that power so as to force upon the States its choices as to how essential decisions

[5]29 U.S.C. § 203 (x) (1970 ed., supp. IV).

regarding the conduct of integral governmental functions are to be made"[6] and decided that the Fair Labor Standards was not applicable to the States. The decision in *National League of Cities* does not, however, seem to preclude the Petitioner's suit herein as it was based upon the now discredited conclusion that traditional or integral activity is the inquiry.

> There are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may back an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising authority in that manner.
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> *National League of Cities,* at 845.

While the *National League of Cities* decision resolved temporarily the immunity of the States to Fair Labor Standards Act claims, *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) concluded that the Civil Rights Act of 1871 was intended by Congress to include municipalities and local government units for the purposes of a § 1983 action when the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.,* at 694. Although not discussed in *Monell,* it is curious to contrast *Ford Motor Co. v. Department of the Treasury,* 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945) which held that even though a State is not a named party to a suit, Eleventh Amendment immunity may apply if the action

[6]National League of Cities, at 855.

seeks to recover money damages from the state. Perhaps the lesson of *Monell* therefore, teaches that the State Department of Highways and Public Transportation in the case before this Court does not necessarily enjoy the immunity of the State as argued by the Respondents in the Fifth Circuit. Anticipating the agency immunity contention by the Respondent, the Petitioner does not quarrel with the obvious fact that since she sued both her government agency employer and the State of Texas that any judgment rendered on her behalf would be in all probability be paid from the State Treasury. However, in view of the *Monell* decision, such a recovery does not appear contrary to prior decisions of this Court.

The majority opinion relies heavily on *Atascadero State Hospital v. Scanlon,* 473 U.S. —, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985) and *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. —, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). Neither case supports a decision that Congress does not have exclusive power to regulate admiralty and maritime matters. *Garcia* involved yet another Fair Labor Standards Act case while *Atascadero* evolved from a claim by Scanlon for compensatory, injunctive and declaratory relief for violation of § 504 of the Rehabilitation Act of 1973.[7] The immediate distinction between *Garcia* and *Atascadero* and the case pending herein is that *Garcia* is a commerce clause matter whereas *Atascadero* stems from Fourteenth Amendment Rights.

In *Garcia* the Court overruled its decision in *National League of Cities v. Usery* and rejected ". . . a rule of

[7]87 Stat. 394, as amended, 29 U.S.C. 794.

state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional'." *Garcia,* at 1016. The Court acknowledges the difficulty of formulating "objective criteria" to resolve the competing interests between the commerce power and state sovereignty. Justice Blackmun writes:

> The States unquestionably do 'retain a significant measure of sovereign authority'. *EEOC v. Wyoming,* 460 U.S., at 269, 103 S.Ct., at 1077 (Powell, J., dissenting). They do so. however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.
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> *Garcia,* at p. 1017.

The majority opinion relies upon *Garcia* and *Atascadero* to support the conclusion that this Court has established a "bright line" rule. The essence of this conclusion is that Petitioner's suit is barred by the Eleventh Amendment in the absence of express waiver by the State of Texas or "specific congressional language contained within the statute itself requiring the abrogation of sovereign immunity."[8] In *Atascadero,* Justice Powell stated repeatedly that express language by Congress was required in order to conclude that a State has waived its Eleventh Amendment immunity.

> Thus, we have held that a State will be deemed to have waived its immunity "only where stated 'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction' ". *Edelman v. Jordan, supra,*

[8]*Welch,* at pp. 1272-73.

at 673 quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909). Likewise, in determining whether Congress is exercising its Fourteenth Amendment powers has abrogated the States' Eleventh Amendment immunity, we have required "an unequivocal express of congressional intent to 'overturn the constitutionally guaranteed immunity of the several states.'" *Pennhurst II, supra,* at —, quoting *Quern v. Jordan,* 440 U.S. 332, 342 (1979).

Atascadero, 87 L.Ed .2d, at p. 178.

In relation to the contention of Scanlon that the enactment of the Rehabilitation Act abrogated the States' constitutional immunity this Court further stated:

To reach respondent's conclusion, we would have to temper the requirement, well established in our cases, that Congress unequivocally express its intention to abrogate the Eleventh amendment bar to suits against the States in federal court. *Pennhurst II,* 465 U.S., at —; *Quern v. Jordan, supra,* at 342-345. We decline to do so, and affirm that Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.

Id., at p. 179.

The Court continues its analysis of the required findings and concludes:

For these reasons, we hold consitent with *Quern, Edelman* and *Pennhurst II,*—that Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in that statute itself.

Id., at p. 180.

The Court reaffirmed the principle of *Quern* that "mere receipt of federal funds cannot establish that a State has consented to suit in federal court." *Id.,* at p. 182. The application of *Atascadero* to this Jones Act suit necessarily

taxes this Court to decide (1) whether the admiralty and maritime power granted to Congress by Art. III, § 2 of the Constitution is sufficient reason to abrogate the immunity of the State and (2) whether *Parden* and *Petty* are still viable thus allowing Petitioner to proceed with her suit.

Subsequent to *Atascadero* this Court decided *Green v. Mansour,* — U.S. —, 106 S.Ct. 423, — L.Ed.2d — (1985) and *Papasan v. Allain,* — U.S. —, 106 S.Ct. 2932, — L.Ed. 2d — (1986). Neither case involves Congress' power or regulation over admiralty and maritime matters. In *Green,* this Court reaffirmed the holding in *Quern v. Jordan* that the Eleventh Amendment bars the federal courts from issuing declaratory judgments against state officials when there is no ongoing violation of federal law. In *Papasan v. Allain,* the petitioners sought relief for breach of trust and denial of equal protection. This Court in a divided opinion held that Eleventh Amendment immunity applied to the breach of trust action but did not apply to the claim under equal protection. The rationale of the court insofar as the immunity defense is based on there being no distinction "between a not-yet-extinguished liability for a past breach of trust and the continuing obligation to meet trust responsibilities". *Id.,* 106 S.Ct. at 2942. The instant case should not be controlled by *Green* or *Papasan* unless this Court concludes that *Petty* and *Parden* are no longer viable in Eleventh Amendment case law.

Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959) precedes *Parden.* Narrowly interpreted, *Petty* stands only for the proposition that the Jones Act applies to states which engage in maritime activities with a sue and be sued contractual clause ratified by Congress. A broad interpretation

of *Petty* is that it stands for the abrogation of Eleventh Amendment immunity under the Jones Act when states engage in the operation of a vessel on navigable waters. *Parden* suggests that *Petty* should be relied on as an abrogation of state immunity by entry into maritime activity by a state. The incorporation of the FELA[9] by the Jones Act is set forth in the statute itself.

> any seamen who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and *in such action all statutes of the United States modifying or extending the common law right or remedy in case of personal injury to railroad employees shall apply;* and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and *in such action on all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.* Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.
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> 46 U.S.C. § 688 (emphasis added).

The FELA provides in relevant part that:

> every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by any such carrier in such commerce . . . [and that] under this chapter an action may be brought in a district court of the United States.
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> 45 U.S.C. § § 51, 56.

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[9]45 U.S.C. 51, et seq. (Federal Employers Liability Act).

The difference between *Petty* and this case insofar as Eleventh Amendment immunity asserted by Respondent is that in *Petty* a bi-state corporation was formed which contained a "sue and be sued" clause ratified by Congress. Thus, this Court had no difficulty in concluding that the Jones Act applied to state-operated vessels.

> We can find no more reason for excepting state or bi-state corporations from 'employer' as used in the Jones Act than we could for excepting them from either the Safety Appliance Act (*United States v. California,* 297 U.S. 175, 80 L.Ed. 567, 56 S.Ct. 421) or the Railway Labor Act (*California v. Taylor,* 353 U.S. 553, 1 L.Ed. 2d 1034, 77 S.Ct. 1037). In the latter case we reviewed at length federal legislation governing employer-employee relationships and said, "When Congress wished to exclude state employees, it expressly so provided." 353 U.S. at 564. The Jones Act (46 U.S.C. § 688) has no exceptions from the broad sweep of the words "any seaman who shall suffer personal injury in the course of his employment may" etc. The rationale of *United States v. California* and *California v. Taylor* makes it impossible for us to mark a distinction here and hold that this bi-state agency is not an employer under the Jones Act.
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> *Petty,* at 282-283.

By contrasting *Petty* with *Atascadero,* significant differences are evident. First, the Jones Act creates a federal remedy for the seamon wiht specific reference to jurisdiction in the federal district courts. The claim of Scanlon in the *Atascadero* case is founded in title VI of the Civil Rights Act of 1964. Thus, the Fourteenth Amendment is the basis of the action in *Atascadero.* Second, the *Petty* decision does not turn in part on the issue that the state is a recipient of federal funds whose intent to waive immunity is important, but rather is based on the plenary power of

Congress to exclusively regulate admiralty and maritime activity. Whereas several decisions in the development of Eleventh Amendment immunity law are determined by a contest of competing state and federal interests between the federal commerce power and the states' immunity[10]—only *Petty* involves the admiralty and maritime power of Congress.

Third, the *Atascadero* reasoning to ascertain the appropriate constitutional balance between the federal and state government does not apply to *Petty* because states do not regulate *any facet* of admiralty or maritime activity. Therefore, a constitutional balance inquiry, as suggested in *Atascadero* is not required in this matter. It seems apparent from the foregoing that even without *Parden* that Petitioner can overcome the immunity defense urged by the state and upheld by the majority opinion of the Fifth Circuit.

> While states may sometimes supplement Federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretive decisions of this Court. These principles have been frequently declared and we adhere to them. See, e.g., *Garrett v. Moore-McCormack Company,* 317 U.S. 239, 243-246; 63 S. Ct. 246, 249-251, 87 L.Ed. 239 and cases cited therein. *Caldarola v. Eckert,* 332 U.S. 155, 67 S.Ct. 1569 (1968), does not support the contention that a state which undertakes to enforce federally created maritime rights can dilute claims fashioned by federal power, which is dominant in this field.
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> *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, at 409, 410, 74 S.Ct. 202 (1953).

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[10]See, e.g., *Employees v. Dept. of Public Health and Welfare; Edelman v. Jordan; Quern v. Jordan.*

Parden is the case most closely aligned with the facts in this matter. Were it not for the decisions in *Employees, Edelman, Garcia* and *Atascadero* which sway the majority of the Fifth Circuit from *Parden* and *Petty,* the resolution of this matter would be directly controlled by *Parden* and *Petty.* However, not one of the cases which seek to impose the requirement of unequivocal expression of congressional intent is limiting on *Parden.* In *Parden,* an employer filed an FELA claim against a railroad owned and operated by the State of Alabama. The District Court dismissed the suit and dismissal was affirmed by the Fifth Circuit on the ground of sovereign immunity. This Court reversed and held that since the defendant voluntarily engaged in the ownership and operation of a railroad in interstate commerce, that it impliedly waived its sovereign immunity defense.

> To read a sovereign immunity exception into the Act would result, moreover, in a right without a remedy; it would mean that Congress made 'every' interstate railroad liable in damages to injured employees but left one class of such employees—those whose employers happen to be State owned—without any effective means of enforcing that liability. We are unwilling to conclude that Congress intended so pointless and frustrating a result. We therefore read the FELA as authorizing suit in a Federal District Court against State owned as well as privately owned common carriers by railroad in interstate commerce.
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> *Parden,* at p. 190.

The issues resolved by Parden were that Congress did intend to subject a state to suit by state employees under the FELA and it had the power to do so.[11] Similarly, in

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[11]Parden, at p. 187.

United Transportation Union v. Long Island R. Co., 455 U.S. 678, 102 S.Ct. 1349, 71 L.Ed.2d 547 (1982) the Court reaffirms *Parden*. That reaffirmation seemingly discredits the majority opinion of the Fifth Circuit requirements of explicit congressional intent contained within the act. The narrow issue upon which the court granted review in the *United Transportation Union* case was whether the Tenth Amendment prohibits application of the Railway Labor Act[12] to a state-owned railroad engaged in interstate commerce. Although the Court held the Railway Labor Act applicable to the state based upon the criteria set forth in *National League of Cities v. Usery*, a precise recitation was given as to Congress' authority to abrogate state immunity in the sphere of railroad operation pursuant to the commerce clause power.

> Just as the Federal Government cannot usurp traditional state functions, there is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal regulatory regulation.
>
> *United Transportation Union*, at p. 1355

Just as the Railway Labor Act was applicable to the state by virtue of federal preemption (without a specific expression of intent in the statute itself.[13] as the majority

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[12]45 U.S.C. § 151, et. seq.

[13]In the Court of Appeals, the Railroad maintained that Congress did not intend the Act to apply to state-owned passenger railroads. 634 F.2d at 23. Whatever merit that claim may have had, it is no longer tenable. After that court rendered its decision, Congress amended the Act to add § 9A, 95 Stat. 681, 45 U.S.C. § 159a (1976 ed., Supp. V). Section 9A establishes special procedures to be applied to any dispute "between a publicly funded and publicly operated carrier providing rail commuter service . . . and its employees. *United Transportation Union, supra*, n. 4 at 1353.

states is required by *Atascadero*), the Jones Act must certainly abrogate the constitutionally guaranteed immunity of this Respondent.

The Respondent asserts that in the absence of legislative history clearly expressing the intent of the framers to apply the Jones Act to the states and abrogate its Eleventh Amendment immunity that this Court should not act otherwise. However, it has ben clearly demonstrated by the foregoing that the Jones Act abrogates the immunity of the state by its grant of plenary power pursuant to Article III, § 2 of the Constitution which grants Congress exclusive control over admiralty and maritime matters and in accordance with the *Petty* and *Parden* decisions of this Court.

II. EXPRESS WAIVER

The majority opinion of the Fifth Circuit concludes "that the State of Texas has not waived expressly its sovereign immunity beyond that contained in Section 19 of the statute which gives state employees coverage only under the Texas Workers' Compensation law if the agency has adopted that law." *Welch*, at p. 1274. Thus, the Fifth Circuit establishes by its decision an exception to the Jones Act for seamen employed by the State of Texas.

Article 6252-19, Sec. 3 of the Texas Tort Claims Act provides in relevant part:

> Each unit of government in *the state shall be liable for money damages for* property damage or *personal injuries* or death *when proximately caused by the negligence* or wrongful act or omission of any officer or employee acting within the scope of his employ-

ment or office *arising from the operation or use of a motor-driven vehicle and motor-driven equipment* . . . under circumstances where such officer or employee would be personally liable to the claimant in accordance with the law of this state, or death or personal injuries so caused from some condition or some use of tangible property, real or personal, under circumstances where such unit of government, if a private person, would be liable to the claimant in accordance with the law of this state.

Tex. Rev. Civ. Stat. Ann., Art. 6252-19, Sec. 3 (emphasis added).

Art. 6252-19, Sec. 4, thereafter provides:

To the extent of such liability created by Section 3, immunity of the sovereign to suit, as heretofore recognized and practiced in the State of Texas with reference to units of government, *is hereby expressly waived and abolished, and permission is hereby granted by the legislature to all claimants to bring suit against the State of Texas, or any and all other units of government covered by this Act, for all claims arising hereunder.*

Tex. Rev. Civ. Stat. Ann., Art. 6252-19, Sec. 4 (emphasis added).

Standing alone, the above Texas statutes directly and expressly waive Eleventh Amendment immunity. Petitioner was injured by the negligence of a co-employer in the use of a motor driven crane. The majority opinion of the Fifth Circuit acknowledges the applicability of § 3 (and presumably § 4 although that is not stated) but states the following:

> Section 19 of the Act, however, limits this waiver of immunity. It provides that a governmental unit carrying Texas Worker's Compensation Insurance is entitled to the 'privileges and immunities' granted by the Workers' Compensation Act to 'private persons and corporations'.
>
> *Welch,* at p. 1273.

The relevant provisions of Texas law which the Fifth Circuit concludes limit the § 4 waiver are the following:

> Any governmental unit carry Workmen's Compensation Insurance or accepting the provisions of the Workmen's Compensation Act of the State of Texas shall be entitled to all of the privileges and immunities granted by the Workmen's Compensation Act of the State of Texas to private persons and corporations.
>
> *Tex. Rev. Civ. Stat. Ann,* art. 6252-19 § 19.
>
> Employees of the Department[14] and parents of minor employees shall have no right of action against the agents, servants, or employees of the Department for damages for personal injuries nor shall representatives and beneficiaries of deceased employees have a right of action against the agents, servants, or employees of the Department for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the Department as is provided in this law . . .
>
> *Tex. Rev. Civ. Stat. Ann.* art 6674s, § 6.

The apparent conflict between § 4 waiver and the exclusive workers compensation remedy as set forth above is resolved by the Fifth Circuit for Respondent on the case of *Lyons v. Texas A & M University,* 545 S.W.2d 56 (Tex. Civ. App. 1976). In *Lyons,* a seaman sued Texas A & M pursuant to the Jones Act, the Texas Tort Claims Act and the general maritime law for injuries sustained in the course of

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[14]Department refers to the Respondent, State Department of Highways and Public Transportation which employed Welch.

his employment. The district court dismissed the suit holding that the exclusive remedy for Lyons was the workmen's compensation statute. The state appellate court affirmed and held (1) the state is immune from the general maritime law claim by *Ex Parte New York;* (2) the Texas Tort Claim Act § 19 limitation precluded the plaintiff's claim under that law and; (3) the state was immune from the Jones Act claim because Lyons was a "workman" and not a "seaman". The final holding was necessary to prohibit the suit because "the general compensation law provides coverage for 'employees', and the definition of 'employees' exclude 'seaman on vessels engaged in interstate or foreign commerce . . . ' Tex. Rev. Civ. Stat. Ann. art. 8309, § 1 (1967). This exclusion of seamen from workmen's compensation statute was made necessary by a series of Supreme Court decisions beginning with *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917)." *Lyons,* at 59. The court concluded that Lyons (a cook on a vessel in navigation) was therefore a "workman" employed by Texas A & M University. Whereas the majority of the court below find that a "tortured interpretation" is required to conclude express waiver in Texas law, Petitioner suggests that such an interpretation is no more tortured than the state appellate court's distinction between seaman and workman.

Prior to *Lyons,* the decision in *Flores v. Norton & Ramsey Lines, Inc.,* 352 F.Supp. 150 (W.D. Tex. 1972) held that "the Texas Legislature expressly waived sovereign immunity in suits against the State of Texas under the Texas Tort Claims Act in federal as well as state courts . . ." *Id.* at 154. Furthermore, *Flores* stated, "Section 13 of the Texas Act states: 'this Act shall be liberally

construed to achieve the purposes hereof.' Thus, any ambiguity in the Act ought to be construed in favor of the claimant." *Id.* at 156. As *Flores* did not involve a seaman's Jones Act claim, the application is limited to the issue of express waiver. However, the limited application does support Petitioner's claim that an express waiver has been given by the state in § 4 of the Act and the ambiguity created by the Worker's Compensation Act should be construed against the State.

J. Cire, who authored the district court opinion in this case, and the *Lyons* decision also decided *Mifsud v. Palisades Geophysical Institute, Inc.,* 484 F.Supp. 159 (S.D. Tex. 1980). Therein, the Court held that Texas had not consented to Jones Act suits because the state workmen's compensation statute was an exclusive remedy. However, if Plaintiff should establish that he was a third party, non-employee of the state agency, then he could sue in federal court only in a maritime negligence action. The reconciliation of *Lyons and Mifsud* escapes this Petitioner for if Mifsud was not an employee of the state, he has no Jones Act claim. Similarly, in *Lyons* it was held that general maritime law actions against the state were precluded by *Ex Parte New York.* Lyons, Mifsud and now Welch are disenfranchised of their Jones Act rights by this tortured interpretation of state law. To conclude otherwise would render meaningless the principle that the seaman's Jones Act rights may not be precluded by the enactment of state worker's compensation statute as an exclusive remedy. See, e.g. *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917); *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 74 S. Ct. 202, 98 L.Ed. 143 (1953); *In re Holoholo Litigation,* 557 F.Supp. 1024 (D.Haw.

1983); *Roberts v. City of Plantation*, 558 F.2d 751 (5th Cir. 1977); *Thibodeaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978), cert. den., 442 U.S. 909, 99 S.Ct. 2820 (1979); *Ledoux v. Petroleum Helicopters, Inc.*, 609 F.2d 824 (5th Cir. 1980).

The holding in *Lyons* that "The state, however, is immune from suit without its consent. It could provide any remedy it wished and limit seaman to that remedy exclusively" is erroneous and should be corrected by this Court's decision.

The state of Texas has expressly waived immunity in §§ 3 and 4 of the Texas Tort Claims Act and this Court should therefore reverse the decision of the Fifth Circuit herein.

CONCLUSION

Petitioner Welch respectfully suggests that the decision of the Fifth Circuit Court of Appeals should be overruled by this Court and this case remanded to the United States District Court, Southern District of Texas for trial.

In support of this conclusion, Petitioner submits that the Jones Act abrogates state Eleventh Amendment by virtue of the powers granted the Federal Government pursuant to Article 3, § 2 of the U.S. Constitution.

Furthermore, Petitioner submits that the decision of the Court of Appeals should be reversed on the grounds that the State of Texas has constructively waived its immunity granted by the Eleventh Amendment by entry into

an exclusively regulated sphere of activity, i.e., admiralty and maritime matters.

Finally, Petitioner respectfully suggests that the State of Texas has expressly waived its Eleventh Amendment immunity by enactment of the aforesaid provisions of the Texas Tort Claims Act.

WHEREFORE, Petitioner Jean E. Welch respectfully prays that the decision of the U.S. Court of Appeals for the Fifth Circuit be reversed and this matter and this case be remanded to the United States District Court for trial.

Respectfully submitted,

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QUESTIONS PRESENTED

I.

Under the Jones Act can a seaman employed by a state bring an action against the state for money damages for personal injury in the course of her employment when Congress has not unequivocally expressed its intention to authorize an action for money damages against a state?

II.

Assuming arguendo that the Jones Act authorizes an action against a state for money damages, does the Jones Act authorize bringing the action in federal court?

III.

Assuming arguendo that the Jones Act authorizes an action against a state for money damages, but does not authorize bringing the action in federal court, does the Texas Tort Claims Act authorize a Texas seaman to bring a Jones Act claim against Texas in federal court?

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NO. 85-1716

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JEAN E. WELCH,

Petitioner,

V.

THE STATE DEPARTMENT OF HIGHWAYS
AND PUBLIC TRANSPORTATION AND
THE STATE OF TEXAS,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

TO THE HONORABLE JUSTICES:

NOW COME the State Department of Highways and Public Transportation and the State of Texas, respondents, by and through their attorney, the Attorney General of Texas, and file this brief on the merits.

OPINIONS AND JUDGMENTS BELOW

Plaintiff seeks reversal of the decision of the United States Court of Appeals for the Fifth Circuit, sitting en banc, which is reported at 780 F.2d 1268 and reprinted at pages 1a-46a of the appendix to the petition for writ of certiorari. The panel opinion of the Fifth Circuit is reported at 739 F.2d 1034 and reprinted at pages 49a-74a of the appendix to the petition for writ of certiorari. The memorandum opinion and order of the district court is reported at 533 F. Supp. 403 and reprinted at pages 75a-81a of the appendix to the petition for writ of certiorari, as well as pages 21-28 of the joint appendix.

JURISDICTION

The judgment of the court of appeals, sitting en banc, was entered on January 22, 1986. A timely petition for writ of certiorari was filed on April 21, 1986. A writ of certiorari was granted on October 6, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

(Set Forth in Appendix)

U.S. Const. art. III, § 2.

U.S. Const. amend. XI.

The Necessary and Proper Clause, U.S. Const. art. I, § 8.

The Jones Act, 46 U.S.C. § 688(a).

The Texas Tort Claims Act, ch. 292, 1969 Tex. Gen. Laws 874, *amended by* ch. 50, 1973 Tex. Gen. Laws 77.

Tex. Rev. Civ. Stat. Ann. art. 6674s, § 2 & § 6 (Vernon 1977).

STATEMENT OF THE CASE

The State of Texas, through her State Department of Highways and Public Transportation, operates a ferry boat

service between Galveston Island, Texas, and Port Bolivar, Texas. (J.A. 9.) Plaintiff was employed by Texas to work on the ferry boat. (J.A. 9.) She alleges that she was injured when a mobile crane fell on her in the course of her employment as a "seaman." (J.A. 9-10.) Invoking the Jones Act, 46 U.S.C. § 688, she brought an action against the State Department of Highways and Public Transportation and the State of Texas in the United States District Court for the Southern District of Texas, Houston Division. (J.A. 8-17.)

Texas moved to dismiss the action on the ground that a Jones Act claim could not be maintained against the state in federal court consistent with the principles of sovereign immunity exemplified by the eleventh amendment.[1] (J.A. 18-20.) The district court dismissed, holding both that the Jones Act does not authorize an action against the state in federal court and that the Texas Tort Claims Act does not authorize a claimant to bring a Jones Act claim against the state in federal court but instead limits all state employees to state workers' compensation for personal injuries sustained in the course of employment. *Welch v. State Dep't of Highways and Public Transp.*, 533 F. Supp. 403 (S.D. Tex. 1982). A panel of the Court of Appeals for the Fifth Circuit reversed the district court. *Welch v. State Dep't of Highways and Public Transp.*, 739 F.2d 1034 (5th Cir. 1984). The court of appeals, sitting en banc, corrected the panel's error and affirmed the district court. *Welch v. State Dep't of Highways and Public Transp.*, 780 F.2d 1268 (5th Cir. 1986) (en banc).

SUMMARY OF ARGUMENT

The court of appeals, sitting en banc, should be affirmed. The

1. Whatever the extent of the sovereign immunity of a state, it extends to departments or agencies of the state that have no existence apart from the state. *Alabama v. Pugh*, 438 U.S. 781, 781-82, 98 S.Ct. 3057, 3057 (1978). Since 1933 the State Department of Highways and Public Transportation has been authorized by state statute to operate a ferry to connect state highways. *See* Tex. Rev. Civ. Stat. Ann. art. 6812a (Vernon 1960). The State Department of Highways and Public Transportation is an agency of Texas, created by a Texas statute, with no existence apart from Texas. *See* Tex. Rev. Civ. Stat. Ann. art. 6663-6674 (Vernon 1977 & Vernon Supp. 1986). The department therefore enjoys the same immunity as Texas. For economy, Texas will be referred to as the sole defendant—respondent.

doctrine of sovereign immunity, exemplified by the eleventh amendment, shields Texas from plaintiff's claim against the state for money damages under the Jones Act. Presumably Congress could in the exercise of its constitutional powers abrogate this immunity and subject Texas to an action for money damages in either federal or state court.

Before finding that Congress has authorized an action in federal court against a state, however, this Court requires an "unequivocal expression of congressional intent." Likewise the Court should require an unequivocal expression of intent before finding that Congress has authorized an action against a state at all. After *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005 (1985), which leaves the states to the vagaries of the political process for the protection of their role in our federal system, requiring an unequivocal expression of congressional intent before applying a federal statute to the states is critical. Such a requirement ensures both specific notice to the states of proposed legislation and specific congressional consideration of how proposed legislation may affect the states. These measures are necessary to fulfill the promise that the political process will safeguard the states.

A search for congressional intent as to the Jones Act does not yield an unequivocal expression regarding the states. Nothing about the Jones Act suggests that Congress ever contemplated applying it to the states, much less authorizing actions against the states in federal court. Plaintiff, relying upon dicta in *Petty v. Tennessee Missouri Bridge Comm'n*, 359 U.S. 275, 79 S.Ct. 785 (1959), argues that the general provision that any seaman may bring an action against his employer includes seamen employed by the states. The general term "any seaman," however, does not provide the specific notice to the states or evidence the specific congressional contemplation of the affect of the legislation upon the states that the requirement of an unequivocal expression is designed to ensure. The *Petty* court dicta should be rejected.

Moreover, the legislative history of the Jones Act reveals no intention to include the states within its terms or to authorize an action against the states in federal court. Given this legislative history, the Court should not conclude that the

representatives of the several states intended to abrogate the immunity of the states.

With nothing in the language or history of the Jones Act to show congressional intent to abrogate immunity, plaintiff points to the incorporation into the Jones Act of the Federal Employers' Liability Act (FELA), which has been held to authorize an action against the states. The FELA, however, is incorporated into the Jones Act to define the right and remedies of a "seaman," not to define who is a seaman or whom a seaman may sue. In short, plaintiff fails to establish an unequivocal expression of congressional intent either to apply the Jones Act to the states or to authorize an action against the states in federal court.

Lacking an unequivocal expression, plaintiff argues that Texas has consented to suit either "constructively" under the rationale of *Parden v. Terminal Ry.*, 377 U.S. 184, 84 S.Ct. 1207 (1964), or expressly in the Texas Tort Claims Act. Both these arguments fail for a single reason: If Congress did not intend the Jones Act to apply to the states, then Texas cannot be said to have consented to suit in federal court "constructively" by operating a ferry or "expressly" by enacting the Texas Tort Claims Act. Plaintiff loses her consent argument because she cannot establish that the Jones Act applies to the states.

Even assuming that Congress intended the Jones Act to apply to the states, the doctrine of "constructive" consent to suit in federal court announced in *Parden* has been effectively overturned in subsequent cases beginning with *Employees of Dep't of Public Health & Welf. v. Missouri*, 411 U.S. 279, 93 S.Ct. 1614 (1973). The Court now requires an unequivocal expression of congressional intent to authorize suit in federal court. As has been shown, no such intention is expressed in the Jones Act.

Neither does the Texas Tort Claims Act authorize suit in federal court. To win her argument that Texas has consented in the Texas Tort Claims Act to a Jones Act claim for money damages against the state in federal court, plaintiff must show two things. First, plaintiff must show that a claim under the Texas Tort Claims Act can be brought in federal court. Second,

plaintiff must show that her claim comes within the terms of the Texas Tort Claims Act. If plaintiff fails to establish either point, then she cannot proceed in federal court under the Texas Tort Claims Act.

Plaintiff fails to establish each point. Claims under the Texas Tort Claims Act cannot be brought in federal court. Before a state statute can be said to waive immunity to suit in federal court, the state statute must clearly declare such an intention. The Texas Tort Claims Act does not. Therefore, whatever rights the act gives plaintiff, the act does not authorize her to proceed in federal court.

Even were this Court to hold that the act authorizes suit in federal court, plaintiff's claim does not come within the terms of the act. The Texas Tort Claims Act authorizes an action against the state based upon state common-law negligence with liability limited to $100,000 for compensatory damages. A Jones Act claim does not come within these terms. The Texas Tort Claims Act also makes workers' compensation a state employee's exclusive remedy. Thus, plaintiff cannot proceed on her Jones Act claim in federal court under the Texas Tort Claims Act.

ARGUMENT

I. CONGRESS NEITHER INTENDED THE JONES ACT TO APPLY TO THE STATES NOR TO AUTHORIZE AN ACTION FOR MONEY DAMAGES AGAINST THE STATES IN FEDERAL COURT.

When considering whether a federal statute authorizes an action for money damages against a state in federal court, this Court has viewed the question as one of jurisdictional immunity to suit in federal court under the eleventh amendment. The Court has fallen into the custom of considering first whether a federal statute authorizes suit against a state in federal court, as opposed to whether it authorizes suit against a state at all, because the eleventh amendment is in "the nature of a jurisdictional bar," and jurisdictional questions are necessarily answered before substantive questions. *See Edelman v.*

Jordan, 415 U.S. 651, 677-78, 94 S.Ct. 1347, 1363 (1974).[2] The Court makes a mistake, however, in first considering the artificial question whether a federal statute authorizes suit in federal court. Instead, the Court should first consider whether a federal statute even applies to the states.

Answering this so-called substantive question is really the best first step in answering the jurisdictional question. If Congress did not intend a statute to apply to the states at all, then it certainly could not have intended to authorized an action against a state in federal court. Likewise, if Congress did not intend a statute to apply to the states at all, then a state cannot constructively or expressly "waive" eleventh amendment immunity or "consent" to jurisdiction under the statute.

As a matter of logic, congressional intent in enacting a statute is more likely to be discerned if the Court first decides whether Congress intended to authorize an action for money damages against the state at all—in any court. Only if the answer to this question is yes is it then helpful to ask whether Congress intended such an action to be brought in federal court. *Welch*, 780 F.2d at 1275 (Higginbotham, J., concurring).

As a matter of economy, bringing a case against a state under a federal statute in federal court only to have it dismissed because Congress never intended to authorize suits against the states in federal court and starting the case over in state court under the same federal statute only to have it dismissed because Congress never intended the statute to apply to the states at all is terribly wasteful of the resources of the parties, the federal courts, and the state courts. The Court should ask first whether a federal statute applies to the states and then whether it authorizes suit in federal court. *See Employees*, 411 U.S. at 287-89, 93 S.Ct. at 1619 (Marshall, J., concurring).

In this brief, Texas answers both the substantive and jurisdictional questions. In subpart A, Texas explains why the

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2. Unlike a true jurisdictional bar, however, eleventh amendment immunity can be waived by a state. *See Employees Dep't of Public Health & Welf. v. Missouri*, 411 U.S. 279, 294-95, 93 S.Ct. 1614, 1623 (1973) (Marshall, J., concurring).

standard for statutory construction of a federal statute should be the same regardless whether the Court is addressing the substantive question or the jurisdictional question. In each case, the Court should require "an unequivocal expression of congressional intent" in order to maintain the constitutionally mandated balance of power between the states and the federal government.

In subpart B, Texas shows that the Jones Act does not unequivocally express a congressional intention either to apply the Jones Act to the states or to authorize an action for money damages against the states in federal court. Since, if Congress did not intend to do the first, it could not have intended to do the second, these two questions of intent—substantive and jurisdictional—are analyzed together.

Then, in subpart C, Texas shows that because federal seamen are excluded from the Jones Act, the Court can only conclude that the Jones Act excludes state seamen.

A. Just as an unequivocal expression of congressional intent is required to find that Congress means to abrogate a state's jurisdictional immunity to suit in federal court, an unequivocal expression of congressional intent should be required to find that Congress means to abrogate a state's substantive immunity to suit.

1. An unequivocal expression of intent is required to find that Congress means to abrogate a state's jurisdictional immunity to suit in federal court.

The Court continually reaffirms that Congress must make a clear statement of any intention to abrogate the eleventh amendment bar to suits against the states in federal court.[3]

3. The AFL-CIO as amicus urges the Court to overrule *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504 (1890), and argues that this case presents an "appropriate occasion" for reconsidering whether the doctrine of sovereign immunity, as exemplified by the eleventh amendment, immunizes states from actions brought by private parties in federal court to enforce substantive federal rights. *See Brief of the American Federation of Labor and Congress*

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See Atascadero State Hosp. v. Scanlon, 105 S.Ct. 3142, 3147-48 (1985); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S.

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of Industrial Organizations as Amicus Curiae Supporting Petitioner at 2-3. Texas contends for two different reasons that this case does not present an appropriate occasion for reconsidering *Hans* or its theory of sovereign immunity.

First, the question whether a state is immune from an action brought by a private party in federal court to enforce a substantive federal right arises in this case only if the Court concludes that Congress intended the Jones Act to apply to the states. As Texas shows, Congress had no such intention. Thus, there is no substantive federal right to enforce in federal court and no reason to reconsider *Hans*.

Second, in urging the overruling of *Hans*, the AFL-CIO presents a ground for decision not urged by petitioner or considered by the courts below. Were this Court to seriously consider overruling *Hans*, it should choose a case in which the issue has been fully developed through the decisional process, not a case in which the issue is interjected at the eleventh hour by a stranger.

Moreover, stare decisis counsels against overruling *Hans*. As the Court recognized when reaffirming *Roe v. Wade* in the *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 419-20, 103 S.Ct. 2481, 2487 (1983), "the doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law." In this case, as in the *City of Akron*, "there are especially compelling reasons for adhering to *stare decisis*." *See id.*

Hans was unanimously decided almost a century ago. Since then it has been consistently reaffirmed by the Court. As a result, *Hans* has been assumed and relied upon as the allocation of power between the states and the federal government has been worked out. Imagine two columns of protections and powers. In Column A are the protections and powers of the states. In Column B are the protections and powers of the federal government. In the last century, protection and power has been steadily moved from Column A (the states) to Column B (the federal government). *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552-54, 105 S.Ct. 1005, 1019 (1985).

Assent to move protection and power from Column A to Column B was given based in part on what remained behind in Column A. Now, having gained assent to move protection and power over the last century from Column A to Column B, the proponents of an ever stronger federal government argue that sovereign immunity never belonged in Column A to begin with. The doctrine of stare decisis prevents such a flim-flam. "When rights have been created or modified in reliance on established rules of law, the arguments

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89, 99, 104 S.Ct. 900, 907 (1984) (*Pennhurst II*); *Quern v. Jordan*, 440 U.S. 332, 342-45, 99 S.Ct. 1139, 1145-47 (1979). In *Pennhurst II* the Court cast the test as requiring an "unequivocal expression of congressional intent." 465 U.S. at 99, 104 S.Ct. at 907. In *Atascadero* the Court adds "that Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." 105 S.Ct. at 3148.

This special rule of statutory construction is designed to protect the constitutional balance between the states and the federal government. The states "occupy a special and specific position in our constitutional system." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556, 105 S.Ct. 1005, 1020 (1985). The states are a "counterpoise to the power of the federal government." 469 U.S. at 571, 105 S.Ct. at 1028 (Powell, J., dissenting). This balance of power between the states and the federal government is part of the structural protections in the Constitution of our fundamental liberties. 469 U.S. at 572, 105 S.Ct. at 1029 (Powell, J., dissenting). The sovereign immunity of the states against suit in federal court serves to maintain this balance. *Atascadero*, 105 S.Ct. at 3147-48. Before finding that a federal statute abrogates immunity to suit in federal court, thereby undermining the balance of power, the federal courts should be certain of congressional intent. *Id.* To ensure certainty, the Court has fashioned a rule of statutory construction that requires an unequivocal expression of congressional intent. *Id.*

To escape the application of this rule, plaintiff relies upon the now discredited reasoning in *Parden v. Terminal Ry.*, 377 U.S. 184, 84 S.Ct. 1207 (1964). The bare majority that made up the *Parden* court reasoned that because the Federal Employers' Liability Act (FELA) is applicable to "every" common carrier, the FELA applies to state railroads. 377 U.S. at 187-88, 84 S.Ct. at 1210. The *Parden* court could have simply reasoned that Congress thereby abrogated the states' immunity to suit in federal court. Perhaps because it was doubted in

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against their change have special force." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272, 100 S.Ct. 2647, 2656 (1980) (Stevens, J.) Since the rights of the states have been modified in reliance upon *Hans*, the arguments against overruling *Hans* have this special force.

1964 whether Congress had such power, the *Parden* court instead found "consent" to suit in federal court by the state's choice of operating a railroad. 377 U.S. at 192-93, 84 S.Ct. at 1213.

The four dissenting justices in *Parden* argued that the majority was departing from the clear statement rule. 377 U.S. at 198-200, 84 S.Ct. at 1216-17. The dissenters' view ultimately prevailed in *Employees of the Dep't of Public Health and Welf. v. Missouri*, 411 U.S. 279, 93 S.Ct. 1614 (1973). In *Employees* the question was whether the Fair Labor Standards Act subjected a state to suit. Applying the clear statement rule, the *Employees* court held that it did not. In doing so, the *Employees* court limited *Parden* to its facts and expressly rejected the notion of constructive consent:

> [W]e decline to extend *Parden* to cover every exercise by Congress of its commerce power, where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the states and putting the states on the same footing as other employers is not clear.

411 U.S. at 286-87, 93 S.Ct. at 1619. Subsequently in *Edelman v. Jordan*, when again faced with a *Parden* argument, the Court wrote, "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights," and refused to apply *Parden*. 415 U.S. 651, 653, 94 S.Ct. 1347, 1360 (1979).

If the rationale of *Parden* does not apply to the FLSA in *Employees*, then it should not apply to the Jones Act. While the *Employees* court superficially distinguished *Parden* from *Employees* as a case of a "proprietary" railroad versus a "not for profit" hospital, the *Employees* court effectively overruled *Parden*. Whatever the merits of the *Employees* court's "proprietary" distinction at the time, *Garcia* exposes the "inability to give principled content to the distinction between 'governmental' and 'proprietary'." 469 U.S. at 543-47, 105 S.Ct. at 1010-1016. After *Garcia*, any basis for distinguishing *Parden* from *Employees* is gone. In short, the *Parden* court's notion of

constructive consent is dead and needs now only be interred.

Interring the rationale of *Parden* is not, as plaintiff implies, an abandoment of the principle of stare decisis. Just the opposite. The law before *Parden* and the law after *Parden* require a clear statement before concluding that a federal statute abrogates a state's immunity to suit in federal court. *Parden* stands alone. Moreover, as this Court recognized when on another occasion it faced a precedent that could not be squared with its more recent cases, "the same respect for the rule of law that requires us to seek consistency over time also requires us to seek consistency in the interpretation of an area of law at any given time." *Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 391, 103 S.Ct. 1905, 1916 (1983). This higher principle of stare decisis forces recognition that the rationale of *Parden* has long since been abandoned by the Court.

That the rationale of *Parden* has been abandoned does not mean that the result in *Parden* must be reversed. Even when the rationale for a particular statutory construction is recognized as flawed, the Court will presumptively adhere to a prior decision construing a legislative enactment because Congress could have changed the law if it deemed the prior decision wrong. *Illinois Brick Co. v. Illinois*, 431 U.S 720, 736-37, 97 S.Ct. 2061, 2070 (1977). With respect to the FELA, the Court may presume that it got the right result even if for the wrong reason. At the same time, for federal statutes yet to be construed, including the Jones Act, the Court should require an unequivocal expression of congressional intent before concluding that they abrogate immunity.[4]

4. One further point about *Parden* needs to be made. The *Parden* court found constructive consent *to suit in federal court* only after finding that the FELA applied to the states. If the Court is convinced that Congress never intended the Jones Act to apply to the states at all, as Texas will demonstrate in subpart B, then *Parden* has no application to this case. *Edelman*, 415 U.S. at 672, 94 S.Ct. at 1360. While the *Parden* court did reason that a state can constructively consent to suit in federal court, neither the *Parden* court nor any other court has ever suggested that a state can be found to have constructively consented to be governed by a federal statute that Congress never intended to apply to the states.

The requirement of an unequivocal expression of congressional intent found in the commerce case of *Employees* should be no different when Congress acts pursuant to its admiralty power. Any other result would be nonsensical. Congress after all has admiralty power only by inferring congressional authority through the necessary and proper clause in article I, § 8, and only to the extent that such power is necessary and proper to effectuate the grant of *judicial* power over admiralty in article III, § 2.[5] *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 39-40, 63 S.Ct. 488, 490 (1943); *Southern Pacific v. Jensen*, 244 U.S. 205, 214-15, 37 S.Ct. 524, 528 (1916). This judicial power, however, does not extend to the states. *In re New York*, 256 U.S. 490, 41 S.Ct. 588 (1921) *(New York I)* (holding that in rem admiralty jurisdiction does not reach a state without its consent); *In re New York*, 256 U.S. 503, 41 S.Ct. 592 (1921) (*New York II*) (holding that in personam admiralty jurisdiction does not reach a state without its consent). Because congressional power to reach the states under the necessary and proper clause of article I can necessarily be no broader than the article III judicial power from which it is derived, congressional admiralty power is likewise limited.

Compare commerce and admiralty power to power under the fourteenth amendment. Section 5 of the fourteenth amendment expressly grants Congress the power "to enforce, by appropriate legislation, the provisions of this article." Since the whole point of the fourteenth amendment is to limit state power, its grant of congressional power to enforce its provisions presumably includes the power to abrogate state immunity. Yet the Court still requires an unequivocal expression of congressional intent before reading a federal statute enacted pursuant to § 5 of the fourteenth amendment to abrogate a state's immunity to suit in federal court. *See, e.g., Fitzpatrick v. Bitzer*, 427 U.S. 445, 453-57, 96 S.Ct. 2666, 2670-72 (1976). If a clear statement is required to abrogate immunity in fourteenth amendment cases, a fortiori a clear statement is required in commerce or admiralty cases.

5. The development of congressional admiralty power is traced in D. Robertson, *Admiralty and Federalism* 143-45 (1970). Texas does not argue that Congress could not apply the Jones Act to the states. Whatever the limit of admiralty power, the commerce power is probably a sufficient basis. *See id.* As *Employees* makes clear though, Congress must act unequivocally under the commerce clause.

2. The need for an unequivocal expression of congressional intent is as great if not greater when determining whether a federal statute abrogates substantive immunity to suit as when determining whether it abrogates jurisdictional immunity to suit in federal court.

The Court announced in *Garcia* that the "Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace." 469 U.S. at 550, 105 S.Ct. at 1017. If the Constitution delegates regulatory authority to Congress, and Congress determines to regulate the states by subjecting them to court actions for money damages, presumably Congress can do so. As Professor Laurence Tribe theorizes,

> Article III permits federal adjudication of suits against states that are properly authorized pursuant to article I, but article III does not of its own force abrogate the defense of sovereign immunity when that defense would otherwise be cognizable in federal court.

L. Tribe, *American Constitutional Law* § 3-37 at 139 (1978).

Given this view of congressional and judicial power, the states' position in the federal system is significantly weakened. The *Garcia* court, however, promises that the states will be protected by the political process:

> The principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraint that our system provides through state participation in federal government action. The political process ensures that laws that unduly burden the States will not be promulgated.

469 U.S. at 556, 105 S.Ct. at 1020.

Professor Tribe suggests that the clear statement rule has a critical role to play in ensuring that the states' interests are truly protected in the political process:

> By making a law unenforceable against the states unless a contrary intent is apparent in the language of the statute, the clear statement rule would further ensure that attempts to limit state power will be unmistakable, thereby structuring the legislative process to allow the centrifugal forces in Congress the greatest opportunity to protect the states' interests. Thus a recognition of the peculiar institutional competence of Congress in adjusting federal power relationships makes this an appropriate and useful approach to reconciling national power with state litigational immunity.

L. Tribe, *American Constitutional Law* § 3-37 at 140 (1978).

In his concurring opinion below, Judge Higginbotham echoes Tribes' view that the clear statement rule is necessary to ensure that the states are protected and adds an additional concern:

> *Garcia* concludes that the primary limit on this [federal] power is the political process of state participation in federal decisionmaking. If this process is to have its force, legislation that is meant to affect states must say so; states will then be aware of proposed federal legislation perceived to intrude into their operations, and will be able to draw their political weapons. But if legislation is silent or half-heartedly ambiguous as to its effect on states, and a court later declares that it applies to states, the process will have been skewed and the states will have been effectively sandbagged. The result would be a sidestepping of the structural protections outlined in *Garcia* and a return of the judges from the sidelines.

Welch, 780 F.2d at 1275-76.

By "a return of the judges from the sidelines," Judge Higginbotham means that being forced as a judge to deduce whether states are included in the federal statutory scheme " 'inevitably invites an unelected federal judiciary to make decisions about which . . . policies it favors and which it dislikes.' " *Welch*,

780 F.2d at 1275 (quoting *Garcia*, 469 U.S. at 546, 105 S.Ct. at 1015). Requiring a clear statement of congressional intent both protects the states and keeps the federal courts out of the business of making policy.

Judge Higginbotham concludes:

> The concepts of federalism upon which *Garcia* assertedly rests require that we construe federal statutes to exclude states from their coverage unless Congress expressly indicates otherwise. If a federal statute does not recite its applicability to states, the inquiry should end. Only if a federal law explicitly governs state behavior do we reach the question of whether the Eleventh Amendment bars a private citizen from suing under the federal statute in federal court.

Welch, 780 F.2d at 1275.

This Court has also suggested that the clear statement rule should be used to determine whether legislation applies to the states. In *Pennhurst State School and Hosp. v. Halderman*, when analyzing legislation purportedly enacted pursuant to the fourteenth amendment, the Court stated:

> Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment.

451 U.S. 1, 16, 101 S.Ct. 1531, 1539 (1981) (*Pennhurst I*). The Court also reaffirmed in *Pennhurst I* that

> if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

451 U.S. at 17, 101 S.Ct. at 1540 (citations omitted).[6] *Cf. DeCanas v. Bica*, 424 U.S. 351, 96 S.Ct. 933 (1976) (before concluding that a state regulation is displaced by a federal statute, a court must find that preemption is the "clear and manifest purpose" of Congress).

The Court's eleventh amendment jurisprudence also argues for applying the clear statement test to decide the substantive question. The Court's eleventh amendment cases have not just been about *where* a state is sued; they have also been about *whether* a state can be sued. The Court has noted on several occasions that a formal indication of Congress' intent to abrogate the states' eleventh amendment immunity ensures that Congress has not imposed significant fiscal burdens on the states without careful thought. *Quern*, 440 U.S. at 344 n.16, 99 S.Ct. at 1147 n.16; *Hutto v. Finney*, 437 U.S. 678, 697 n. 27, 98 S.Ct. 2565, 2577 n.27 (1978); *Employees*, 411 U.S. at 284-85, 93 S.Ct. at 1618. If the clear statement rule applies only to the jurisdictional question, however, then the Court was wrong. If actions under federal statutes can be brought against the states in state court, without an unequivocal expression of congressional intent, then significant fiscal burdens will be placed on the states without any assurance of careful thought by Congress as surely as if the actions were prosecuted in federal court. The clear statement rule must apply to both the jurisdictional and substantive halves of sovereign immunity. Then the rule will truly operate to protect the state fisc.

In summary, before an act of Congress is read as stripping a state of her sovereign immunity and subjecting her to an action for money damages, the Court should require Congress to unequivocally express such an intention.

B. The Jones Act does not unequivocally express an intention by Congress to abrogate the immunity of the states.

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6. *Parden*'s "constructive" consent theory is certainly not consistent with *Pennhurst I*. Given *Garcia*, *Parden*'s "constructive" consent theory is also unnecessary. Under *Garcia*, Congress can presumably authorize an action for money damages against a state in state or federal court if it merely unequivocally expresses its intention to do so.

1. The general term "any seaman" is not an unequivocal expression that includes seamen employed by the states.

Plaintiff makes the simple argument that "any seaman" means "any seaman," including a seaman employed by the state. However, general terms (for example, person, persons, bodies politic, etc.) are not unequivocal expressions. *United States v. United Mine Workers*, 330 U.S. 258, 271-73, 67 S.Ct. 677, 685-86 (1947). By their very nature, general terms do not give the specific notice or show the specific contemplation required to abrogate immunity. *Id.* Thus, the general authorization in the Jones Act that "any seaman" may bring suit, like the general authorization in the Civil Rights Act that "every person" shall be liable, is not a sufficiently unequivocal statement from which to conclude that Congress intended to abrogate the immunity of the states.[7] *See Quern*, 441 U.S. at 340-45, 99 S.Ct. at 1145-47.

Of course, in *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565 (1978), language in the Civil Rights Attorneys' Fee Award Act, 42 U.S.C. § 1988, no more specific than that of the Jones Act was found to abrogate immunity. The *Hutto* court, however, expressly relied on compelling legislative history to find an abrogation of immunity. 437 U.S. at 694, 98 S.Ct. at 2575. In addition, the *Hutto* court was careful to emphasize that an award of litigation costs is different from "retroactive liability for prelitigation conduct." 437 U.S. at 695-698, 98 S.Ct. at 2575-77. Costs have traditionally been awarded without regard to sovereign

7. In addition to the Fifth Circuit, the Eleventh Circuit has also held that the terms of the Jones Act do not abrogate the immunity of the state to suit in federal court. *Sullivan v. Georgia Dep't of Natural Resources*, 724 F.2d 1478, 1481, *reh'g en banc denied*, 729 F.2d 782 (11th Cir.), *cert. denied*, 469 U.S. 872, 105 S.Ct. 222 (1984). Both the Fifth and Eleventh Circuits expressly reserved whether the Jones Act substantively applies to the states. *See Welch*, 780 F.2d at 1273; *Sullivan* 724 F.2d at 1481. Six federal district courts, including the *Welch* district court, have also addressed in published decisions whether the Jones Act authorizes suit against the state in federal court. The four district courts that found a congressional intent to abrogate the immunity of the states did not even refer to the clear statement rule of statutory construction. *See Brody v. North Carolina*, 557 F. Supp. 184, 186 (E.D.N.C. 1983); *In re Holohola*, 512 F.Supp. 889, 902-05 (D. Haw. 1981); *Huckins v.*

(Footnote continued on next page)

immunity. *Id.* As the Court made clear in *Quern*, *Hutto* does not alter the fundamental rule that general terms cannot abrogate immunity. 441 U.S. at 344 n.16, 99 S.Ct. at 1147 n.16.

Plaintiff, however, cites *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 283-83, 79 S.Ct. 785, 790 (1959), for the proposition that Congress intended to include the states in the class of employers subject to the Jones Act by providing that "any seaman" could sue his employer. The *Petty* court suggested that because Congress did not expressly exempt seamen employed by the states from the Jones Act, then "any seaman" includes seamen employed by the states.[8]

The *Petty* court's interpretation of the Jones Act is of dubious weight as a precedent for many reasons. First, *Petty* turned on consent to suit; the holding that the Tennessee-Missouri Bridge Commission was included in the Jones Act was an afterthought, at best an alternative rationale. 359 U.S. at 276-83, 79 S.Ct. at 787-90. Second, what *Petty* has to say about whether the Jones Act applies to the states is merely dicta. The parties before the Court were Petty and the Tennessee-Missouri Bridge Commission. No state was before the Court. Because bi-state agencies are subject to special con-

(Footnote continued from previous page)
Board of Regents of Univ. of Michigan, 263 F. Supp. 622, 623 (E.D. Mich. 1967); *Cocherl v. Alaska*, 246 F. Supp. 328, 329-30 (D. Ala. 1965). The two district courts that found no congressional intent to abrogate the immunity of the states employed the clear statement rule of statutory construction. *See Smith v. Louisiana*, 586 F. Supp. 609, 614 (E.D. La. 1984); *Welch v. State Dep't of Highways and Public Transp.*, 533 F. Supp. 403, 406 (S.D. Tex. 1982).

8. The *Petty* court ignored the last sentence of the Jones Act: "Jurisdiction in such action shall be under the court of the district in which the defendant employer *resides* or in which his *principal office* is located." 46 U.S.C. § 688(a) (emphasis added). This sentence strongly implies by the use of the terms "resides" and "principal office" that Congress had in mind natural persons and corporations, not states. In any event, no significance should be placed in the fixing of jurisdiction in a federal district court. This Court long ago settled that this provision relates to venue, not jurisdiction, and that states have concurrent jurisdiction over Jones Act claims. *See Engle v. Davenport*, 271 U.S. 33, 37-38, 46 S.Ct. 410, 411 (1926); *Panama R. Co. v. Johnson*, 264 U.S. 375, 384-85, 44 S.Ct. 391, 392-93 (1924).

gressional control and regulation under the compact clause of the Constitution, article I, § 10, perhaps the clear statement rule need not apply before subjecting a bi-state agency to congressional regulation. After all, a bi-state agency is as much a creature of Congress as of the states. *See Petty*, 359 U.S. at 282 n.7, 79 S.Ct. at 790 n.7. Thus, the alternative holding of *Petty* that a bi-state agency comes within the terms of the Jones Act does not compel the dicta that a state comes within the terms of the Jones Act.

Moreover, how many justices joined in the dicta that the Jones Act applies to the states or what they might have meant is murky. Three justices dissented and expressly refused to reach the substantive question whether the Jones Act applies to the states. 359 U.S. at 289, 79 S.Ct. at 794. Three justices concurred but expressly noted that they did not reach the eleventh amendment issue, implying that they saw the case as turning on the sue-and-be-sued clause imposed by Congress as a condition of approving the compact. 359 U.S. at 283, 79 S.Ct. at 791. Only three justices clearly joined in the dicta that the Jones Act applies to the states.

The final and most significant problem with *Petty*, however, is that the three justices who did clearly conclude in dicta that the Jones Act applies to the states did not employ the clear statement rule. 359 U.S. at 282-83, 79 S.Ct. at 790. Stare decisis has limited application in a case of constitutional immunity. *See Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 321, 97 S.Ct. 582, 592 (1977); *Edelman v. Jordan*, 415 U.S. 651, 671, 94 S.Ct. 1347, 1395-60 (1974). Dicta should have even less application. The dicta that the states are included in the Jones Act, which is embedded in an alternative holding, should have no application at all in light of the importance of the clear statement rule in protecting the states in the federal system. As Judge Higginbotham reasons in his concurring opinion below, if the political process is to protect the states' interest, as *Garcia* promises, "*Garcia* must ultimately lead to the rejection of *Petty's* construing presumption." *Welch*, 780 F.2d at 1277.

Rejecting the *Petty* court's dicta that the Jones Act applies to the states will not significantly disrupt either established legal principles or practices based upon established legal prin-

ciples. Unlike the statutory construction in *Parden*, which need not be reversed even though its rationale must be rejected, the dicta about the Jones Act in *Petty* should have no force. The statutory construction as it relates to the states in *Parden* is part of a holding, while the statutory construction as it relates to the states in *Petty* is not. *Parden* has arguably been relied upon in a significant fashion. *Petty* has not. To begin with, state seamen are few in number and are protected by state workers' compensation. Moreover, the states appear to have disregarded the *Petty* dicta. *See Lyons v. Texas A & M University*, 545 S.W.2d 56 (Tex. Civ. App.—Houston [14 Dist.] 1976, writ ref'd n.r.e.); *Gross v. Washington State Ferries*, 59 Wash. 2d 241, 367 P.2d 600 (1961). The Court has no reason to give weight to *Petty*, and should hold that the general term "any seaman" does not include seamen employed by the states.

2. The legislative history of the Jones Act is silent about the states and therefore not an unequivocal expression of congressional intent.

Just as the use of the term "any seaman" does not provide any assurance that Congress considered the interest of the states or intended to include them within the Jones Act, nothing in the legislative history of the Jones Act provides such comfort. Indeed, the legislative history should be positively discomforting to those who argue that the Jones Act applies to the states or authorizes suit in federal court. When Congress intends to abrogate the constitutional right of state immunity, one would naturally expect the legislative history of the statute in which it does so to reflect this intention. *Quern*, 440 U.S. at 343, 99 S.Ct. at 1146. As noted by the district court, however, plaintiff in this case points to nothing in the legislative history of the Jones Act to suggest that Congress intended to abrogate the constitutional right of immunity. *Welch v. State Dep't of Highways*, 533 F. Supp. 403, 406 (S.D. Tex. 1982). Likewise, Judge Brown in his dissenting opinion in the Fifth Circuit points to nothing in the legislative history of the Jones Act to support his conclusion that Congress intended to abrogate the constitutional right of immunity. *Welch*, 780 F.2d at 1277-90.

Texas, however, presented the Fifth Circuit with an indepen-

dent examination of the legislative history of the provision in question—46 U.S.C. § 688(a). In its present form this provision became law in 1920 and has never been amended. Commonly known as the Jones Act, it was part of the Merchant Marine Act of 1920 and received scant attention from Congress. *See* G. Gilmore & C. Black, *The Law of Admiralty* § 6-20 at 327 (2d ed. 1975).

The legislative history reveals no intention to create a right and remedy against the states, to abrogate immunity to suit in federal court, or to subject the states to Jones Act claims in their own courts. *See Providing for the Disposition, Regulation, or Use of Property Built or Acquired by the United States: Hearing of H.R. 10378 Before the House Comm. on the Merchant Marine and Fisheries,* 66th Cong., 1st Sess. (1919); *Establishment of an American Merchant Marine: Hearings Before the Senate Comm. on Commerce,* 66th Cong., 2d Sess. (1919-1920); H.R. Rep. No. 443, 66th Cong., 1st Sess. (1919); H.R. Rep. No. 1093, 66th Cong., 2d Sess. (1920); H.R. Rep. No. 1102, 66th Cong., 2d Sess. (1920); H.R. Rep. 1107, 66th Cong., 2d Sess. (1920); S. Rep. No. 573, 66th Cong., 2d Sess. (1920); 59 Cong. Rec. 6494, 6803-6816, 6857-6869, 6985-6994, 6036, 7043-7048, 7163,7164, 7198, 7211, 7223-227, 7274, 7291, 9293-9296, 7326, 7344, 7336, 7347-7356, 7409-7420, 7504, 8163, 8182, 8290, 8334, 8412, 8442, 8465-8470, 8487, 8489, 8493, 8572, 8576, 8488-8609, 8620, 8622, 8678, 9360, 9367 (1920). *See also The Establishment and Development of an Adequate Merchant Marine as Suggested by the United States Shipping Board: A Communication to Hon. Wm. S. Greene, Chairman of the House Comm. on the Merchant Marine and Fisheries,* 66th Cong., 1st Sess. (1919); *President's Message to Congress on the American Merchant Marine,* H.R. Doc. 201, 67th Cong., 2d Sess., 9 (1922).

What the legislative history does reveal is that the Merchant Marine Act of 1920 was adopted to address two post-World War I problems: an inadequate merchant marine and a surplus of navy vessels. S. Rep. No. 573, 66th Cong., 2d Sess., 1, 4 (1920); H.R. Rep. 443, 66th Cong., 1st Sess., 2 (1919). These two concerns dominate the legislative history. No mention is made of suits against the states or of seamen employed by the

states.[9]

Because it is inconceivable that the representatives of the several states would have passed a provision intended to abrogate the constitutional right of immunity without comment, one can only conclude that they did not intend this provision to apply to state seamen. With no mention in the language of the statute or the substance of the proceedings before Congress that the Jones Act might subject the states to federal claims for money damages or suits in federal court, to conclude otherwise would be to renege on the promise of *Garcia* that the states will have an opportunity to defend themselves in the political process and that Congress will carefully weigh their interests.

3. The incorporation of the FELA is not an unequivocal expression of congressional intent.

Not finding a clear statement in the terms or legislative history of the Jones Act, plaintiff turns to a theory of incorporation. The Jones Act incorporates the Federal Employers' Liability Act, 45 U.S.C. § 51, as follows:

> *Any seaman* who shall suffer personal injury in the course of his employment *may,* at his election, *maintain an action* for damages at law, with the right of trial by jury, and *in such action* all statutes of the United States modifying or extending the common-law right to remedy in cases of personal injury to

9. At least one commentator who has studied the history of the Jones Act has concluded that relief under its terms is not available to those serving on public vessels. J. Willock, *Commentary on Maritime Workers,* 46 U.S.C.A. 211, 258 (West 1944). Professor Willock bases his assumption partly on 46 U.S.C. § 713, which defined a seaman as "every person who serves in any capacity on board a *vessel belonging to a citizen* of the United States . . . ." Act of Dec. 21, 1898, ch. 28, §§ 23 & 26, 30 Stat. 762, 764 (repealed 1983) (emphasis added). As the Second Circuit explains, a "seaman" under the Jones Act should be determined with reference to this historical definition of "seaman." *Gerradin v. United Fruit Company,* 60 F.2d 927, 927-29 (2d Cir.) (Hand, Augustus, J.), *cert. denied,* 287 U.S. 642, 53 S.Ct. 92 (1932). States, of course, are not citizens. Persons serving on a vessel belonging to a state were therefore not seamen under 46 U.S.C. § 713 and should therefore not be seamen under 46 U.S.C. § 688(a).

railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and *in such action* all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principle office is located.

46. U.S.C. § 688(a) (emphasis added).

Plaintiff offers a two-step argument why the incorporation of the FELA shows congressional intent to abrogate immunity to a Jones Act claim. First, plaintiff notes, the FELA authorizes suit against the state when the state employs a railwayman. *See Parden v. Terminal Ry.*, 377 U.S. 184, 84 S.Ct. 1207 (1964). Second, plaintiff argues, because the Jones Act incorporates the FELA, the Jones Act must authorize a suit against the state when the state employs a seaman.

Plaintiff's argument is flawed. The Jones Act does not incorporate the FELA as to *who* may sue. A careful examination of the portion of the Jones Act italicized above reveals that the Jones Act incorporates the FELA's standards of liability as to "such action" authorized by the Jones Act. The Jones Act, however, does not incorporate the FELA to define who may sue or be sued. The statute defines who may sue or be sued only by the terms "Any seaman . . . may . . . maintain an action . . . ." As explained, this general authorization is not an unequivocal expression.

In dissent below, Judge Brown colorfully—but inaccurately—asserts that the language of the FELA was "swallowed up hook, line, and sinker by the Jones Act." *Welch*, 780 F.2d at 1282. Color cannot be substituted for statutory analysis. Neither plaintiff nor Judge Brown deals with Texas' argument that the Jones act refers to the FELA only to define the rights and remedies of those authorized to bring suit under the Jones Act and not to define who may bring suit.

The purpose of incorporation of the FELA into the Jones Act was merely to extend to seamen who may maintain an action under the Jones Act the remedies available to railway workers, and thereby obliterate the traditional distinctions between the kinds of negligence for which a shipowner is liable. *See Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 545-48, 80 S.Ct. 926, 930-31 (1960). Nothing in the jurisprudential history of the Jones Act suggests that the purpose of incorporation was to define who is a seaman.

Finally, plaintiff's incorporation argument is the worst kind of bootstrapping. When Congress enacted the Jones Act in 1920, it had no idea that the FELA, earlier enacted in 1908, would be held in *Parden* in 1964 to authorize a railway employee to sue a state employer. *Parden* itself is based upon the now discredited theory of applying a federal statute to a state entering into a federally regulated sphere of activity. 377 U.S. at 196, 84 S.Ct. at 1215. While as a matter of stare decisis and the presumtive validity of the construction of a legislative enactment, the holding in *Parden* may have vitality, its discredited rationale has been laid to rest and should have no force beyond its grave. Thus, the incorporation of the FELA in the Jones Act is not an unequivocal expression of congressional intent to abrogate the immunity of the state.

C. Because the Jones Act excludes federal seamen, Congress must also have intended to exclude state seamen.

Seamen employed by the federal government who suffer personal injury in the course of their employment have recourse against the United States only for workers' compensation under the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§ 8101 *et. seq.* Pursuant to the FECA, the Court has held that workers' compensation is the exclusive remedy for civilian seamen in the employ of the federal government on public vessels. *Johansen v. United States*, 343 U.S. 427, 72 S.Ct. 849 (1952). Likewise, the Court has held that workers' compensation is the exclusive remedy for civilian seamen in the employ of the federal government on merchant vessels. *Patterson v. United States*, 359 U.S. 495, 79 S.C. 936, *reh'g denied*, 360 U.S. 914, 79 S.Ct. 1293 (1959). Thus, federal seamen cannot sue the United States under the Jones Act. *Mills v. Panama Canal Co.*,

272 F.2d 37 (2d Cir. 1959), *cert. denied*, 362 U.S. 961, 80 S.Ct. 877 (1960).

That federal seamen are limited to federal workers' compensation is instructive as to how this case should be decided in three ways. First, that federal seamen cannot bring suit under the Jones Act bears upon the meaning of "any seaman." Plaintiff argues that "any seaman" is an unequivocal expression of congressional intent to provide a remedy for *all* seamen, including seamen employed by the states. If "any seaman" is an unequivocal expression that includes seamen employed by the states, however, then "any seaman" should logically include seamen employed by the United States. Yet this Court has held that seamen employed by the United States are limited to compensation under the FECA. If "any seaman" does not include seamen employed by the United States, then it is not an unequivocal expression.

Second, what the Court discerns to be congressional intent as to whether federal seamen are covered by the Jones Act bears on congressional intent about state seamen. Judge Brown disagrees. In dissent he writes: "How Congress treats federally-employed seamen simply has nothing to do with its determination that state-employed seamen are covered by the Jones Act." *Welch*, 780 F.2d at 1290. Judge Brown assumes the answer to the critical question and thus misses the point. The question is whether state-employed seamen *are* covered by the Jones Act. Whether federally-employed seamen are covered by the Jones Act helps answer that question. Obviously Congress could treat federal seamen different from state seamen. Surely, however, different results do not follow *from the same statutory language*.

Because the United States is sovereign, the general terms of the Jones Act ("any seaman") are an insufficient statement of intent from which to infer that Congress wished the Jones Act to apply to the United States. Put bluntly, the sovereignty of the United States is so important that the Court will not infer from mere general terms that Congress intended to restrain or to diminish the sovereign rights of the nation. *See United Mine Workers*, 330 U.S. at 272-73, 67 S.Ct. at 686. Were it not for the "legislative breach in the wall of sovereign im-

munity" provided by the FECA, federal seamen would have no remedy against the United States for personal injuries suffered in the course of their employment. *Johansen*, 343 U.S. at 439-40, 72 S.Ct. at 857.

If federalism means anything, it should at least mean that the legal principles for construing statutes and deciding sovereign immunity questions are the same for the individual states as for the United States. *Cf. Tindal v. Wesley*, 167 U.S. 204, 213, 17 S.Ct. 770, 773 (1897) ("But it cannot be doubted that the question whether a particular suit is one against the state, within the meaning of the constitution, must depend upon the same principles that determine whether a particular suit is one against the United States."). Unless there is some principled reason why the rule of construction of federal statutes should be different when applying the statute to the individual states than when applying the statute to the United States, then the Jones Act should no more be held to apply to Texas than it does to the United States. Texas seamen should seek their remedy in workers' compensation just as federal seamen do.

Finally, that the Jones Act excludes federal seamen exposes as bogus the argument that Texas must be subject to the Jones Act because Congress must have intended all seamen to be treated alike because the whole point of admiralty law is uniformity. In fact, the uniformity principle works in Texas' favor: Texas seamen, like federal seaman, are protected by compensation, not the Jones Act. All seamen employed by sovereigns are treated alike.[10] Congress can waive the sovereign immuni-

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10. Admiralty law has always made special provision for both the sovereign United States and the sovereign individual states. As already noted, in *New York I* and *New York II*, decided on the same day, the Court held respectively that sovereign immunity bars an admiralty action in rem and in personam against a state. By resting these decisions on the doctrine of sovereign immunity, the Court implicity acknowledged that the states—like the United States—are immune from all suits in admiralty. Indeed, the Court said exactly this in *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868), which was an admiralty libel in rem against a vessel of the United States. The Court reasoned that because the states as sovereigns would be immune to such a suit in their own courts, then the United States as sovereign should be entitled to the same protection.

(Footnote continued on next page)

ty of the United States and subject it to suits in admiralty for money damages. Likewise, Congress can presumably abrogate the sovereign immunity of the states and subject them to suits in admiralty for money damages. The point, however, is that Congress has done neither in the Jones Act.

II. TEXAS HAS NOT CONSENTED IN THE TEXAS TORT CLAIMS ACT TO A JONES ACT CLAIM FOR MONEY DAMAGES AGAINST THE STATE IN FEDERAL COURT.

Plaintiff argues in her brief on the merits that Texas has expressly consented in the Texas Tort Claims Act, ch. 242, 1969 Tex. Gen. Laws 874, *amended by* ch. 50, 1973 Tex. Gen. Laws 77,[11] to a Jones Act claim for money damages against the state in federal court. *Brief for the Petitioner* at 29-34. In making this argument, plaintiff tries "smuggling additional ques-

(Footnote continued from previous page)

This reasoning, that the states are immune from an admiralty suit brought in either federal or state court, is not at all at odds with *Workman v. New York City*, 179 U.S. 522, 21 S.Ct. 212 (1900). The *Workman* court's admonition that an entity with the capacity to stand in judgment in admiralty cannot escape liability based on local law is easily reconcilable. Unlike *Workman*, where the municipal corporation claimed immunity based upon local law, a state—just as the United States—claims immunity based upon admiralty law's own constitutionally required recognition of sovereign immunity.

11. The Texas Tort Claims Act was approved May 22, 1969, and became effective on January 1, 1970. *See* Texas Tort Claims Act, ch. 292, 1969 Tex. Gen. Laws 874. In 1973 the act was amended. *See* Texas Tort Claims Act, ch. 50, 1973 Tex. Gen. Laws 77. In 1983 the act was again amended. *See* Texas Tort Claims Act, ch. 530, 1983 Tex. Gen. Laws 3084. Because plaintiff's claim arose on March 4, 1981, the date of her injury (J.A. 9), her claim is governed by the 1973 version of the act rather than the 1983 version. *See* Texas Tort Claims Act, ch. 530, § 2, 1983 Tex. Gen. Laws 3084. The 1973 version is reproduced in the appendix.

In 1985, pursuant to the state's continuing statutory revision program, the act was recodified as part of the Civil Practice and Remedies Code. *See* Civil Practice and Remedies Code, ch. 959, 1985 Tex. Gen. Laws 3302. In this form, the act is now found at Tex. Civ. Prac. & Rem. Code §§ 101.002-.109 (Vernon 1986). This recodification works no substantive change in the act. *See* Tex. Civ. Prac. & Rem. Code § 1.001(a)(Vernon 1986). In any event, the recodification is of no relevance to this case because the 1973 version controls plaintiff's claim.

tions into [the] case after [the court has] granted certiorari." *See Irvine v. California*, 347 U.S. 128, 129, 74 S.Ct. 381, 381 (1954). Supreme Court Rule 34.1(a) plainly states that "the brief may not raise additional questions or change the substance of the questions already presented [in the petition for certiorari]." *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 6.26 at 363-68 (6th ed. 1986). The petition for certiorari presents only two questions: 1) whether the eleventh amendment bars a Jones Act claim against a state in federal court; and 2) whether the doctrine of implied waiver of sovereign immunity is still viable. *See Petition for a Writ of Certiorari* at (i). Nowhere in her petition does plaintiff argue that Texas expressly consented by statute to a Jones Act claim for money damages against the state in federal court. In her brief, however, plaintiff belatedly attempts to expand her case to include express consent. The Court should not even consider this untimely raised issue.

Had plaintiff timely raised the issue in her petition for certiorari, the issue would have been exposed as unworthy of review under Supreme Court Rule 17. What a state statute means is of course completely a question of state law, including whether a state statute is a consent to suit. *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464-65, 65 S.Ct. 347, 350-51 (1945). Both the district court and the Fifth Circuit squarely held in this case that Texas has not expressly consented in the Texas Tort Claims Act to a Jones Act claim for money damages against the state in federal court. *Welch*, 533 F. Supp. at 406-07; *Welch*, 780 F.2d at 1273-75. This Court customarily accepts "the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion." *Bishop v. Wood*, 426 U.S. 341, 346, 96 S.Ct. 2074, 2078 (1976).

Moreover, both the district court's and the Fifth Circuit's holdings are based upon an authoritative interpretation of the Texas Tort Claims Act by a state court of appeals. *See Lyons v. Texas A & M University*, 545 S.W.2d 56 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.). The judgment of the state court of appeals was approved by the Texas Supreme Court; the judgment of the state court of appeals could not be

correct unless the holding is also correct; therefore, the Texas Supreme Court implicitly approved the holding. *Welch*, 780 F.2d at 1274-75 (Gee, J., concurring).

There is nothing of importance for this Court to review. Had the question of express consent been presented in the petition for certiorari, the Court undoubtedly would have limited its grant of certiorari to exclude this state-law issue. *See Irvine*, 347 U.S. at 129-30, 74 S.Ct. at 381. Nevertheless, Texas will explain in detail why plaintiff cannot proceed under the Texas Tort Claims Act.

Before the question of consent in the Texas Tort Claims Act even arises, of course, plaintiff must establish that Congress intended the Jones Act to apply to the states. For if Congress did not intend the Jones Act to authorize a seaman employed by a state to sue a state for money damages, then the question of consent to suit in federal court is irrelevant. If the Court has found persuasive Texas' argument that Congress did not intend the Jones Act to apply to the states, then there is no reason to consider the Texas Tort Claims Act. If, however, the Court has concluded that the Jones Act does apply to the states—but does not by its own terms authorize suit in federal court—then there is reason to consider whether Texas has consented in the Texas Tort Claims Act.

To win her argument that Texas has consented to suit, plaintiff must show two things. First, plaintiff must show that a claim under the Texas Tort Claims Act can be brought in federal court. Second, plaintiff must show that her Jones Act claim comes within the terms of the Texas Tort Claims Act. If plaintiff fails to establish either point, then she cannot proceed in federal court under the Texas Tort Claims Act. Plaintiff fails. As will be demonstrated in subpart A, claims under the Texas Tort Claims Act cannot be brought in federal court. As will be demonstrated in subpart B, claims under the Jones Act do not come within the terms of the Texas Tort Claims Act.

A. The Texas Tort Claims Act does not waive immunity to suit in federal court.

1. To read a state statute as waiving immunity to suit in federal court, the state statute must clearly declare such an intention.

A state's "constitutional interest in immunity encompasses not only *whether* it may be sued, but *where* it may be sued." *Pennhurst II*, 465 U.S. at 99, 104 S.Ct. at 907. Thus, a state's waiver of sovereign immunity in its own courts is not a waiver of immunity to suit in federal court. 465 U.S. at 99 n.9, 104 S.Ct. at 907 n.9. *Atascadero*, 105 S.Ct. at 3147. This Court can find that there has been a waiver of immunity to suit in federal court only when it is "stated [in the state statute] 'by *the most express language or* by *such overwhelming implications from the text* as will leave *no* room for *any* other reasonable construction.' " *Edelman*, 415 U.S. at 673, 94 S.Ct. at 1360-61 (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171, 29 S.Ct. 458, 464 (1919)) (emphasis added).

2. The Texas Tort Claims Act does not clearly declare that Texas waives its immunity to suit in federal court.

Surprisingly, even though the Texas Tort Claims Act is over fifteen years old, the Fifth Circuit has never had occasion to address whether the act is a waiver of immunity to suit in federal court. In this case, because the Fifth Circuit decided that a Jones Act claim did not come within the act, it did not discuss whether the act authorized suit in federal court. *Welch*, 780 F.2d at 1273-74. While the federal district courts in Texas regularly dismiss suits under the Texas Tort Claims Act as being barred by the eleventh amendment, there are four published opinions to the contrary. *See Keiffer v. Southern Pacific Transp. Co. v. Corrigan-Cander Ind. School Dist., 486 F. Supp. 798 (E.D. Tex. 1980); Misfud v. Palisades Geophysical Institute, Inc.*, 484 F. Supp. 159 (S.D. Tex. 1980); *Lester v. County of Terry, Texas*, 353 F. Supp. 170 (N.D. Tex. 1973), *aff'd on other grounds*, 491 F.2d 975 (5th Cir. 1973); *Flores v. Norton & Ramsey Lines, Inc.*, 352 F. Supp. 150 (W.D. Tex. 1972).

The most extensively reasoned of these four case is the first case in the line—*Flores*. The opinion in *Flores*, however, was written prior to *Edelman* and does not employ the standard of construction requiring unequivocal consent as outlined in *Edelman* and reaffirmed in *Atascadero*. Not only does the

Flores court not employ the correct standard of statutory construction, its reasoning is completely unpersuasive.

Reading the Texas Tort Claims Act from the first word to the last produces no "express language" that Texas intended to waive her immunity to suit in federal court. In § 4, the act does authorize "all claimants" to sue, which is noted by the *Flores* court. 352 F. Supp. at 153. "All claimants," however, addresses *who* may sue, not *where* they may sue. Nothing in the act contemplates a claimant bringing suit in federal court.

Moreover, after a fair reading of the statute, one can only conclude from the implications of its provisions that Texas did not intend to waive immunity to suit in federal court. First, § 5 expressly provides that suit shall be instituted "in the county," not "the district," in which the cause of action arose. The *Flores* court notes that this provision merely relates to venue. 352 F. Supp. at 153. This reasoning misses the point. The legislature assumed suit in a state court, subject to state venue. As the Fifth Circuit explained when reviewing another Texas statute for waiver of immunity to suit in federal court: "The fixing of venue in Texas counties indicates strongly that the intended waiver applied to state court proceedings." *United Carolina Bank v. Board of Regents*, 665 F.2d 553, 559 (5th Cir. 1982).

Second, § 7 expressly provides that "the Texas Rules of Civil Procedure" shall govern. Because statutes are generally presumed to be enacted by the legislature with full knowledge of the law, one must assume that the legislature knew that only the Federal Rules of Civil Procedure could be applied in federal court. *See Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136 (1965). Because the legislature specified that the Texas Rules of Civil Procedure would govern, it must have intended that cases under the Texas Tort Claim Act be in state court. The *Flores* court argues that the provision for state rules to apply is only "insofar as applicable," and therefore does not evidence an intention for suits to be in state court. 352 F. Supp. at 153. The *Flores* court, however, is guilty of selective editing. Section 7 says "insofar as applicable and to the extent that such rules are not inconsistent with the provisions of the Act," indicating that the question contemplated by the legislature was

whether the state rules fit with the statute, not whether federal rules might ever be applicable.

This analysis of the implications of the provisions of the statute is confirmed by the legislative history of the act. The act was introduced as House Bill 456 in the Sixty-First Regular Session in 1969. Its legislative history is sparse; there are no hearings, reports, debates, gubernatorial messages, or other background available. There is, however, an important and lengthy interim committee report from the committee whose work culminated in the act. *See* Senate Interim Committee to Study Governmental Immunity, *Report to the 61st Legislature* (Jan. 14, 1969) (available in the Texas Legislative Reference Library). Reading this report cover to cover produces not a single shred of evidence that the legislature contemplated waiving immunity to suit in federal court. In fact, as with the act itself, a fair reading of the report leads to the conclusion that the legislature never contemplated that cases under the act would be in federal court.

The approach of the *Flores* court, urged by plaintiff, must be rejected. Nice distinctions and fine reasoning have no place when questions of federalism are concerned. As this Court has cautioned, "it is not consonant with our dual system for the Federal courts to be astute to read the consent [to be sued] to embrace Federal as well as state courts." *Great Northern Life Ins. v. Read*, 322 U.S. 47, 54, 64 S.Ct. 873, 877 (1944). Without a clear declaration of intent, the Court should not read the Texas Tort Claims Act as consent to suit in federal court. *Id.* For this reason alone, plaintiff cannot proceed in federal court under the Texas Tort Claims Act.

B. A Jones Act claim does not come within the terms of the Texas Tort Claims Act.

1. The Texas Tort Claims Act authorizes only state-law negligence actions for limited liability.

Even assuming that the Texas Tort Claims Act authorizes suits against the state in federal court, obviously it only authorizes such suits as come within its terms. Jones Act claims do not come within the liability provisions of the act. The state

is liable pursuant to § 3 of the act as follows:

> Each unit of government in the state shall be liable for money damages for . . . personal injuries or death when proximately caused by the negligence or wrongful act or omission of any officer or employee acting within the scope of his employment or office. . . . Such liability . . . shall not extend to punitive or exemplary damages. Liability hereunder shall be limited to $100,000 per person and $300,000 for any single occurrence for bodily injury or death . . . .

Texas Tort Claims Act, ch. 292, 1969 Tex. Gen. Laws 874, *amended by* ch. 50, § 3, 1973 Tex. Gen. Laws 77.

Thus, under the terms of the act, Texas consents to liability for money damages based upon state common-law negligence. The act expressly excludes punitive damages and expressly limits liability to $100,000 per person. A Jones Act claim does not come within these parameters. Under the Jones Act a claimant can recover punitive damages and can recover without limit for his compensatory damages. Moreover, Jones Act liability is different in significant ways from state common-law negligence. For example, recovery under § 3 of the Texas Tort Claims Act requires proof of proximate cause, while recovery under the Jones Act merely requires proof of producing cause. *See Chisholm v. Sabine Towing & Transp. Co., Inc.*, 679 F.2d 60, 62 (5th Cir. 1982). Thus, the Texas Tort Claims Act cannot be read as consent to an action for money damages under the Jones Act.

2. The Texas Tort Claims Act makes workers' compensation the exclusive remedy for state employees.

Assuming arguendo that a Jones Act claim does come within § 3, plaintiff still cannot proceed because whatever § 3 gives is limited by § 19, which provides that state employees cannot bring a § 3 negligence action against the state but are instead limited to workers' compensation. Section 19 provides:

> Any governmental unit carrying Workmen's Compensation Insurance or accepting the provisions of the Workmen's Compensation Act of the State of Texas shall be entitled to all of the privileges and immunities granted by the Workmen's Compensation Act of the State of Texas to private persons and corporations.

Texas Tort Claims Act, ch. 292, § 19, 1969 Tex. Gen. Laws 874, *amended* by ch. 50, 1973 Tex. Gen. Laws 77.

The Department of Highways and Public Transportation protects its employees by carrying workers' compensation insurance. *See* Tex. Rev. Civ. Stat. Ann. art. 6674s (Vernon 1977). Thus, its employees are limited to workers' compensation because under the Workmen's Compensation Act of Texas one of the privileges and immunities granted private persons and corporations is that workers' compensation is the exclusive remedy when provided by an employer. *See* Tex. Rev. Civ. Stat. Ann. art. 8306, § 3, § 3(a) (Vernon Supp. 1986).

Plaintiff offers a different construction of state law. Plaintiff reasons as follows: 1) § 3 of the act makes each unit of government liable for its negligence; 2) § 4 of the act waives sovereign immunity to the extent of liability created in § 3; 3) § 19 limits liability of those governmental units that carry workers' compensation to that of private persons and corporations; 4) because private persons and corporations cannot escape Jones Act liability by providing workers' compensation, then the legislature did not intend Texas to escape Jones Act liability.[12]

Sitting en banc, a majority of the Fifth Circuit rejected this reasoning. The majority concluded that "the obvious purpose" of the act was to make workers' compensation the exclusive remedy for state employees. *Welch*, 780 F.2d at 1273. Moreover,

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12. Plaintiff is of course right when saying that under *Southern Pacific v. Jensen*, 244 U.S. 205, 37 S.Ct. 524 (1916), private persons and corporations cannot escape Jones Act liability by providing workers' compensation. A private employer and a state, however, are different entities with different rights. *Jensen* is inapplicable to the states because the Jones Act is inapplicable to the states. Referring to the state compensation law under these

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the majority found of "controlling importance" that the only state court decision in point, *Lyons v. Texas A & M University*, 545 S.W.2d 56 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.), holds that the act makes workers' compensation the exclusive remedy for state employees. Plaintiff asks this Court to disregard the state appellate court interpretation in *Lyons*. As previously discussed, this holding in *Lyons* was implicitly approved by the Texas Supreme Court and was accepted by both the district court[13] and the Fifth Circuit.

Not only would it be wrong for the Court to substitute its own interpretation of state law, plaintiff's state-law argument is without merit. Whatever § 19 might be read to mean standing alone, it does not stand alone. When the legislature adopted workers' compensation for the highway department in article 6674s, it provided in § 6 as follows:

> Employees of the Department and parents of the minor employees shall have no right of action against the agents, servants, or employees of the Department for damages for personal injuries . . . , but such employees and their representatives and beneficiaries shall look for compensation solely to the Department as is provided in this law.

Tex. Rev. Civ. Stat. Ann. art. 6674s, § 6 (Vernon 1977). "Employee" is defined in § 2 of article 6674s as including "every person in the service of" the department. *See* Tex. Rev. Civ. Stat. Ann. art. 6674s, § 2 (Vernon 1977).

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circumstances is not an anomaly. Admiralty law has often looked to state law to provide the liability rule. *See, e.g., Bethlehem Steel Company v. Moores*, 335 U.S. 875, 69 S.Ct. 239 (1948) (allowing state compensation for an injury suffered aboard a vessel in San Francisco Bay); *Millers Indemnity Underwriters v. Braud*, 270 U.S. 59, 46 S.Ct. 194 (1926) (allowing state compensation when an underwater worker suffocated while removing obstacles to navigation in navigable waters); *Western Fuel v. Garcia*, 257 U.S. 233, 42 S.Ct. 89 (1921) (allowing the application of a state wrongful death statute when a stevedore was killed at work abroad a vessel).

13. The author of the state court of appeal's three-judge-panel opinion in *Lyons*, The Honorable George E. Cire, moved from the state bench, to the federal bench, and then authored the district court opinion in *Welch*. This certainly strengthens the assumption that he knew and understood state law.

Plaintiff ignores article 6674s. Under the doctrine of *in pari materia*, article 6674s is, however, the governing statute. If there is any conflict between the Texas Tort Claims Act and article 6674s, then the more specific article 6674s controls. *See* 53 Tex. Jur. 2d *Statutes* § 186 (1964 & Supp. 1986). Thus, either the Texas Tort Claims Act should be construed consistently with article 6674s, as the Fifth Circuit reasons, 780 F.2d at 1273, or article 6674s controls as the more specific, as the district court reasons, 553 F. Supp. at 406-07. In either event, highway employees have no right of action against the state under the Texas Tort Claims Act.

CONCLUSION

WHEREFORE, for all these reasons, respondents pray that the judgment of the United States Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

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APPENDIX

U.S. Const. art. III, § 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. amend. XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Necessary and Proper Clause, U.S. Const. art. I, § 8.

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof.

The Jones Act, 46 U.S.C. § 688.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating

the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

The Texas Tort Claims Act, ch. 292, 1969

Tex. Gen. Laws 874, *amended by* ch. 50, 1973 Tex. Gen. Laws 77.

Section 1. This Act shall be known and cited as the Texas Tort Claims Act.

Sec. 2. The following words and phrases as used in this Act unless a different meaning is plainly required by the context shall have the following meanings:

(1) "Unit of government" or "units of government" shall mean the State of Texas and all of the several agencies of government which collectively constitute the government of the State of Texas, specifically including, but not to the exclusion of, other agencies bearing different designations, all departments, bureaus, boards, commissions, offices, agencies, councils and courts; all political subdivisions, all cities, counties, school districts, levee improvement districts, drainage districts, irrigation districts, water control and preservation districts, fresh water supply districts, navigation districts, conservation and reclamation districts, soil conservation districts, river authorities, and junior college districts; and all institutions, agencies and organs of government whose status and authority is derived either from the Constitution of the State of Texas or from laws passed by the Legislature pursuant to such Constitution. Provided, however, no new unit or units of government are hereby created.

(2) "Scope of employment" or "scope of office" shall mean that the officer, agent or employee was acting on behalf of a governmental unit in the performance of the duties of his office or employment or was in or about the performance of tasks lawfully assigned to him by competent authority.

(3) "Officer, agent or employee" shall mean every person who

is in the paid service of any unit of government by competent authority, whether full or part-time, whether elective or appointive, and whether supervisory or nonsupervisory, it being the intent of the Legislature that this Act should apply to every person in such service of a unit of government, save and except as herein provided. Such definition, however, shall not include an independent contractor or an agent or employee of an independent contractor, or any person performing tasks the details of which the unit of government does not have the legal right to control.

Sec. 3. Each unit of government in the state shall be liable for money damages for property damage or personal injuries or death when proximately caused by the negligence or wrongful act or omission of any officer or employee acting within the scope of his employment or office rising from the operation or use of a motor-driven vehicle and motor-drive equipment, other than motor-driven equipment used in connection with the operation of floodgates or water release equipment by river authorities created under the laws of this state, under circumstances where such officer or employee would be personally liable to the claimant in accordance with the law of this state, or death or personal injuries so caused from some condition or some use of tangible property, real or personal, under circumstances where such unit of government, if a private person, would be liable to the claimant in accordance with the law of this state. Such liability is subject to the exceptions contained herein, and it shall not extend to punitive or exemplary damages. Liability hereunder shall be limited to $100,000 per person and $300,000 for any single occurence for bodily injury or death and to $10,000 for any single occurrence or injury to or destruction of property."

Sec. 4. To the extent of such liability created by Section 3, immunity of the sovereign to suit, as heretofore recognized and practiced in the State of Texas with reference to units of government, is hereby expressly waived and abolished, and permission is hereby granted by the Legislature to all claimants to bring suit against the State of Texas, or any and all other units of government covered by this Act, for all claims arising hereunder.

Sec. 5. All cases arising under the provisions of this Act shall be instituted in the county in which the cause of action or a part thereof arises.

Sec. 6. This Act shall be cumulative in its legal effect and not in lieu of any and other legal remedies which the injured person may pursue.

Sec. 7. The laws and statutes of the State of Texas and the Rule of Civil Procedure, as promulgated and adopted by the Supreme Court of Texas, insofar as applicable and to the extent that such rules are not inconsistent with the provisions of this Act, shall apply to and govern all actions brought under the provisions of this Act.

Sec. 8. Suits instituted pursuant to the provisions of this Act shall name as defendant the unit of government against which liability is sought to be established. In suits against other units of government citation shall be served in the manner prescribed by law for other civil cases. If no method is prescribed by law, then service may be had on the administrative head of the unit of government being sued, if available, and if not, the court in which the suit is pending may authorize service in such manner as may be calculated to afford the unit of government a fair opportunity to answer and defend the suit.

Sec. 9. The Attorney Geneal of Texas shall defend all actions brought under the provisions of this Act against any unit of government whose authority and jurisdiction is coextensive witht he geographical limits of the State of Texas. All units of government whose area of jurisdiction is less than the entire State of Texas shall employ their own counsel in accordance with the organic act under which such unit of government is operating; provided, however, that all units of government are hereby expressly authorized to purchase policies of insurance providing protection for such units of government, their officers, agents and employees against claims brought under the provisions of this Act, and when they have acquired such insurance, they are further authorized to relinquish to the company providing such insurance coverage the right to investigate, defend, compromise and settle any such claim. In the case of suits defended by the Attorney General, he may

be fully assisted by counsel provided by insurance carrier. Neither the existence or amount of insurance shall ever be admissible in evidence in the trial of any case hereunder, nor shall the same be subject to discovery.

Sec. 10. Any and all causes of action brought under the provisions of this Act may be settled and compromised by the unit of government involved when, in the judgment of the Governor, in the case of the state, and in the judgment of the governing body of the unit of government in other cases, such compromise would be to the best interests of such government. It is specifically provided, however, that such approval shall not be required in those instances where insurance has been procured under the provisions of Section 9 hereof.

Sec. 11. Judgments recovered against units of government pursuant to the provisions of this Act shall be enforced in the same manner and to the same extent as judgments are now enforced against such units of government under the statutes and law of Texas; and no additional methods of collecting judgments are granted by this Act. Provided, however, if the judgment is obtained against a unit of government that has procured a contract or policy of liability or indemnity insurance protection, the holder of the judgment may use such methods of collecting said judgment as are provided by the policy or contract and statutes and laws of Texas to the extent of the limits of coverage provided therein. It is expressly provided, however, that judgments under this Act becoming final during any fiscal year need not be paid by such unit of government until the following fiscal year except to the extent that they may be payable by an insurance carrier. For the payment of any final judgment obtained under the provisions of this Act, a unit of government not fully covered by liability insurance is hereby authorized to levy an ad valorem tax, the rate of which, if found by the unit of government to be necessary, may exceed any legal unit otherwise applicable except as may be imposed by the Constitution of the State of Texas. In the event that judgments arising under the provisions of this Act become final against a unit of government in any one fiscal year in an aggregate amount, exclusive of insurance coverage, if any, in excess of one percent of the budgeted tax funds, exclusive of general obligation debt service requirements, of such unit of

government for such fiscal year, then such unit of government may pay such judgments over a period of not more than five years in equal annual installments and shall pay interest on the unpaid balance at the rate provided by law.

Sec. 12. (a) The judgment or settlement in an action or claim under this Act shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of a unit of government whose act or omission gave rise to the claim.

(b) The State or a political subdivision may not require any employee to purchase liability insurance as a condition of his employment where the State or political subdivision is insured by a policy of liability insurance.

Sec. 13. The provisions of this Act shall be liberally construed to achieve the purposes hereof.

Sec. 14. The provisions of this Act shall not apply to:

(1) Any claim based upon an act or omission which occurred prior to the effective date of this Act.

(2) Any claim based upon an act or omission of the Legislature, or any member thereof acting in his official capacity, or to the legislative functions of any unit of government subject to the provisions hereof.

(3) Any claim based upon an act or omission of any of the courts of the State of Texas, or any member thereof acting in his official capacity, or to the judicial functions of any unit of government subject to the provisions hereof.

(4) Any claim based upon an act or omission of an officer, agent or employee of any unit of government in the execution of the lawful orders of any court.

(5) Any claim arising in connection with the assessment or collection of taxes by any unit of government.

(6) Any claim arising out of the activities of the National

Guard, the State Militia, or the Texas State Guard, when on active duty pursuant to lawful orders of competent authority.

(7) Any claim based upon the failure of a unit of government to perform any act which said unit of government is not required by law to perform. If the law leaves the performance or nonperformance of an act to the discretion of the unit of government, its decision not to do the act, or its failure to make a decision thereon, shall not form the basis for a claim under this Act.

(8) Any claim arising out of the action of an officer, agent or employee while responding to emergency calls or reacting to emergency situations when such action is in compliance with the laws and ordinances applicable to emergency action.

(9) Any claim based on an injury or death connected with any act or omission arising out of civil disobedience, riot, insurrection or rebellion or arising out of the failure to provide, or the method of providing, police or fire protection.

(10) Any claim arising out of assault, battery, false imprisonment, or any other intentional tort including, but not limited to, disciplinary action by school authorities.

(11) Any claim based upon the theory of attractive nuisance.

(12) Any claim arising from the absence, condition, or malfunction of any traffic or road sign, signal, or warning device unless such absence, condition, or malfunction shall not be corrected by the governmental unit responsible within a reasonable time after notice, or any claim arising from the removal or destruction of such signs, signals or devices by third parties except on failure of the unit of government to correct the same within such reasonable time, after actual notice. Nothing herein shall give rise to liability arising from the failure of any unit of government to initially place any of the above signs, signals, or devices when such failure is the result of discretionary actions of said governmental unit. The signs, signals and warning devices enumerated above are those used in connection with hazards normally connected with the use of those used in connection with hazards normally connected with the use of the

roadway, and this section shall not apply to the duty to warn of special defects such as excavations or roadway obstructions.

Sec. 15. Notwithstanding any provisions hereof, the individual immunity of public officers, agents or employees of government from tort claims for damages is hereby preserved to the extent and degree that such persons presently are immunized.

Sec. 16. Except where there is actual notice on the part of the governmental unit that death has occured or that the claimant has received some injury or that property of the claimant has been damaged, any person making a claim hereunder shall give notice of the same to the governmental unit against which such claim is made, reasonably describing the damage or injury claimed and the time, manner and place of the incident from which it arose, within six months, from the date of the incident. Provided, however, except where there is such actual notice, charter and ordinance provisions of cities requiring notice within a charter period permitted by law are hereby expressly ratified and approved.

Sec. 17. No claim or judgment against a state-supported senior college or university, under this Act, shall be payable except by a direct appropriation made by the Legislature for the purpose of satisfying claims and/or judgments, except in the event insurance has been acquired as provided in Section 9, in which case the claimant is entitled to payment to the extent of such coverage as in other cases.

Sec. 18. (a) This Act shall not apply to any proprietary function of a municipality. The term "motor-driven equipment" as used herein shall not be construed so as to include medical equipment, such as, but not limited to iron lungs, located in hospitals.

(b) As to premise defects, the unit of government shall owe to any claimant only the duty owed by private persons to a licensee on private property, unless payment has been made by the claimant for the use of the premises. Provided, however, that the limitation of duty contained in this subsection shall not apply tot he duty to warn of special defects such as

excavations or obstructions on highways, roads or streets, nor shall it apply to any such duty to warn of the absence, condition or malfunction of traffic signs, signals or warning devices as is required in Section 14(12) hereof.

Sec. 19. Any governmental unit carrying Workmen's Compensation Insurance or accepting the provisions of the Workmen's Compensation Act of the State of Texas shall be entitled to all of the privileges and immunities granted by the Workmen's Compensation Act of the State of Texas to private persons and corporations.

Sec. 19A. The provisions of this Act shall not apply to school districts except as to motor vehicles.

Sec. 20. All laws or parts of law, and all enactments, rules and regulations or any and all units of government, and all organic laws of such units of government, in conflict herewith are hereby repealed, annulled and voided, to the extent of such conflict.

Sec. 21. In the event any section, subsection, paragraph, sentence or clause of this Act shall be declared unconstitutional or void, the validity of the remainder of this Act shall not be affected or impaired thereby; and it is hereby declared to be policy and intent of the Legislature to enact the valid portions of this Act, notwithstanding the invalid portions, if any.

Sec. 22. This Act shall be effective from and after January 1, 1970.

Tex. Rev. Civ. Stat. Ann. art. 6674s, § 2 (Vernon 1977).

The following words and phrases as used in this law shall, unless a different meaning is plainly required by the context, have the following meanings, respectively:

1. "Department" whenever used in this law shall be held to mean the State Highway Department of Texas.[1]

2. "Employee" shall mean every person in the service of the State Highway Department under any appointment or

expressed contract of hire, oral or written, whose name appears upon the payroll of the State Highway Department.

Tex. Rev. Civ. Stat. Ann. art. 6674s, § 6 (Vernon 1977).

Employees of the Department and parents of minor employees shall have no right of action against the agents, servants, or employees of the Department for damages for personal injuries nor shall representatives and beneficiaries of deceased employees have a right of action against the agents, servants, or employees of the Department for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the Department as is provided in this law. All compensation allowed herein shall be exempt from garnishment, attachment, judgment, and all other suits or claims, and no such right or action and no such compensation and no part thereof nor of either shall be assignable, except as otherwise herein provided, and any attempt to assign the same shall be void.

No. 85-1716

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

JEAN E. WELCH,
Petitioner,

v.

STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION AND THE STATE OF TEXAS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* SUPPORTING PETITIONER

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* SUPPORTING PETITIONER

This brief *amicus curiae* is filed with the consent of the parties, as provided for in the Rules of the Court.

INTEREST OF THE *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 93 national and international unions with a total membership of roughly 13,000,000 working men and women. A significant proportion of that membership consists of public employees who work for state governments. These employees, along with many of the AFL-CIO's affiliated unions, are directly affected by restraints that the present construction of the Eleventh Amendment places on the enforcement of federal constitutional and statutory rights.

ARGUMENT

Introduction and Summary

The Texas State Department of Highways operates a ferry in navigable waters off Galveston. Petitioner, a citizen of Texas, was employed by that State as a "seaman" working in the operation of the ferry. Congress, exercising its legislative powers under the Constitution, has duly enacted as federal law a statute—the Jones Act, 46 U.S.C. § 688—granting "any seaman" injured in the course of employment a cause of action against the seaman's empyoyer. Congress intended the Jones Act to apply to any employer of seamen including a state that employs seamen; this Court so held in *Petty v. Tennessee-Missouri Comm'n*, 359 U.S. 275, 282-283 (1959), concluding that there was "no . . . reason for excepting state or bi-state corporations from 'employer' as used in the

Jones Act." Petitioner, having been injured in the course of her employment, filed a Jones Act suit for damages against Texas in a federal district court. The issue in this case is whether Texas is immune from this suit.

In the framework set by this Court's prior decisions, the parties to this case and the members of the court below proceed as if this case turns on whether Texas has waived its immunity from suit. More particularly, the question in debate is whether this Court's decision in *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964), which holds that a state may effect a waiver of its Eleventh Amendment immunity from suit by choosing to operate in areas covered by federal regulation, has been implicitly overruled by subsequent decisions of this Court, which suggest that that immunity may be waived by the states, or abrogated by Congress, only by an express and specific statement.[1]

Without question the debate on that issue accurately reflects the point to which this Court's Eleventh Amendment decisions have come. It is our submission, however, that it is time to revisit the common threshold premise of this debate: that the doctrine of sovereign immunity, as incorporated in the Eleventh Amendment, immunizes

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[1] See, *e.g.*, *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 285-287 (1973) (a statute enacted pursuant to the Commerce Clause will not be deemed to "lift" states' immunity to suit in federal court unless Congress' intention to do so is clearly expressed); *Edelman v. Jordan*, 415 U.S. 651, 671-674 (1974) (distinguishes *Parden*, but contains *dicta* suggesting that a state may not waive Eleventh Amendment immunity by conduct but only by unequivocal language); *Atascadero State Hosp. v. Scanlon*, —— U.S. ——, 105 S.Ct. 3142, 3147-3148 (1985) (a statute enacted pursuant to Fourteenth Amendment will not be deemed to "abrogate" a state's constitutional immunity unless an intention to so abrogate is expressly stated in the statute; and, a state may only waive Eleventh Amendment immunity by "unequivocal waiver specifically applicable to federal court jurisdiction").

states from suits brought by private parties in federal court to enforce federal substantive rights. We are aware that this premise is by now deeply embedded in this Court's decisional law. But in our view the reasons supporting reconsideration of this premise are compelling. This case presents an appropriate occasion for such an inquiry.

The federal system fashioned by our Constitution is based on bifurcated sovereignties. The states are sovereign with respect to all matters reserved to them, but they are not sovereign in those areas where the action of the federal government constitutes "the supreme Law of the Land." U.S. Const., Art. VI, cl. 2. As Chief Justice Marshall put it in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819):

> In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.

With respect to regulation of commerce on coastal and interstate waterways, the federal government, not the states, is sovereign. *E.g.*, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197-200, 210-211 (1824). In enacting the Jones Act, Congress acted within that realm of federal sovereignty. The Jones Act is therefore "the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. Application of that Act to the states by definition does not infringe upon the sovereignty of the states, because the Act deals with matters as to which the states are not sovereign. For that reason, the doctrine of sovereign immunity, in its classical formulation, is not implicated by a suit in federal court against a state on a Jones Act claim. In the words of Justice Holmes:

> Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. Leviathan, chap. 26, 2. A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. [*Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).]

It is our submission that the Eleventh Amendment was adopted to implement this concept of sovereign immunity in the unique context created by the Constitution's provision of federal judicial power not only over cases arising under the Constitution, statutes and treaties of the United States—as to which the federal government is sovereign and the states are not—but also over diversity cases where the substantive rights in litigation are based upon state, not federal, law. In diversity cases, the states are entitled to sovereign immunity under the classical formulation of that concept as described by Justice Holmes. As we show in this brief, the Eleventh Amendment was intended to apply only to cases in which state law supplies the substantive law—diversity cases—and not to federal question cases.[2]

In part I of this brief, we show that the words of the Eleventh Amendment, read together with Article III of the Constitution, cannot be reconciled with the proposition that the Eleventh Amendment was meant to apply to federal question cases. The words of the Eleventh Amendment include no mention of suits by citizens against their own state. This omission was not, as this Court has previously assumed, inadvertent. Under the

[2] A large and growing body of scholarly work supports the proposition asserted here that the Eleventh Amendment was not meant to apply to federal question suits. See the authorities cited by Justice Brennan in his dissenting opinion in *Atascadero State Hosp., supra,* 105 S.Ct., at 3156 n.11.

federal judicial power defined in Article III, section 2, a citizen could not bring a diversity action against his own state, but could only sue his state on federal question or admiralty grounds. The words that Congress chose for use in the Eleventh Amendment to restrict federal jurisdiction—excluding from the federal courts suits brought against a state "by citizens of another state, or by citizens or subjects of any foreign state"—were precisely and only the words that had been used in Article III, section 2, to define those categories of federal *diversity* jurisdiction in which states could be sued by private parties. The words of Article III, section 2, that had extended the federal judicial power to federal question cases and admiralty cases—which could be brought against any party, including states—were not used or referred to in the Eleventh Amendment. Thus, the natural reading of the Eleventh Amendment is that it applies only to diversity cases. Had the framers of the Eleventh Amendment intended to bar all suits brought in federal court by private parties against states—including federal question and admiralty cases—they had only to say so. In that event, they would have had no reason to select out, as they did, only suits against states "by citizens of another state, or by citizens or subjects of any foreign state."

In part II, we show that the conclusion that the Eleventh Amendment was not meant to apply in federal question cases is reinforced when consideration is given to the background of the amendment. The immediate impetus for adoption of the Eleventh Amendment was this Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). *Chisholm* was a diversity case brought in federal court upon a state law cause of action against a state by a citizen of another state. The dissent of Justice Iredell in *Chisholm* is regarded as embodying the substantive rationale of the Eleventh Amendment. We analyze that dissent in detail and show that the logic of Justice Iredell's analysis supporting the applicability of

state sovereign immunity is limited to the context of the federal diversity jurisdiction, and that the concepts of sovereignty urged by Justice Iredell support the notion that states should *not* be immune from suit in federal court in federal question or admiralty cases.

We further show in part II that in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 412 (1821), Chief Justice Marshall in an opinion for the Court ruled (in an alternative holding) that the Eleventh Amendment does not apply in a federal question case in federal court by a citizen against his own state. Chief Justice Marshall also had occasion in *Cohens* to set forth the understanding of the framers of the Constitution on the applicability of state sovereign immunity in federal question cases in the federal courts. Chief Justice Marshall concluded that "a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case." *Id.* at 383.

Nearly 70 years after *Cohens* and nearly 100 years after adoption of the Eleventh Amendment, this Court in *Hans v. Louisiana*, 134 U.S. (1890), ruled that the Eleventh Amendment immunizes states from federal question suits in federal courts. In part III, we show that *Hans* is erroneous. *Hans* was based on a misreading of Justice Iredell's opinion in *Chisholm*, as well as on a misreading of Federalist No. 81 and other sources contemporary to the adoption of the constitution, and on a disregard for the words of Chief Justice Marshall in *Cohens*. Even more, *Hans* was based on a disregard for the words of the Eleventh Amendment.

We further show in part III that the effect of *Hans* is continuing and profound, and that the error of that decision cannot be considered to have outlived the period in which it profitably might be corrected. This is true in two fundamental respects.

First, to grant that states have an immunity from suits brought on matters as to which the federal government is sovereign requires that the powers given to the

federal government be diminished. An enhancement of the sovereignty of the states means a corresponding lessening of the sovereignty of the national government. If, as we submit, such enhancement was not intended by the Constitution, the constitutional scheme is improperly altered.

Second, in order to mitigate the infringement upon proper federal powers that otherwise would result from *Hans*, this Court's Eleventh Amendment decisional law is filled with rules which are difficult to understand in light of the premises of the doctrine and under which the existence of federal authority often turns on whether a variety of empty formalisms are observed. That the sensitive balance between state and federal power has come to depend on *ad hoc* adjustments to the rigor of the *Hans* rule is reason enough to reconsider that rule.

I. THE TEXT OF THE ELEVENTH AMENDMENT

The point of departure for analysis of the meaning of a provision of the Constitution is the language of that provision, which after all is what was duly agreed upon and adopted as law. Thus, the words of the provision, read together with the other provisions of the Constitution so as to make sense of the document as a whole, provide the surest guide to the provision's meaning. Yet beginning with *Hans v. Louisiana*, 134 U.S. 1 (1890), the Eleventh Amendment has been interpreted in a manner which, as *Hans* itself acknowledges (134 U.S. at 15), cannot be squared with the constitutional text.[3]

The Eleventh Amendment provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity,

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[3] *See also, e.g., Atascadero State Hosp., supra*, 105 S.Ct. at 3145:

> Thus, in *Hans v. Louisiana* [citation omitted], the Court held that the Amendment barred a citizen from bringing a suit against his own State in federal court, even though the express terms of the Amendment do not so provide.

> commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

By its terms, the Eleventh Amendment does not deny the federal courts jurisdiction over suits by citizens against their own state. In holding such suits to be outside the jurisdiction of the federal courts, *Hans* thus read into the Eleventh Amendment a limitation of federal judicial power nowhere contained in the words of the Eleventh Amendment, and gave that Amendment a meaning not even remotely suggested by its text.

The *Hans* Court thought it necessary to thus rewrite the Eleventh Amendment in order to make sense out of it. Proceeding from the premise that the Eleventh Amendment "indignantly repelled" all suits against a state by citizens of another state, even where founded upon a federal question, the Court reasoned that, having precluded such suits, it "is almost an absurdity on its face" to allow citizens to bring federal question suits against their own state. 134 U.S. at 15. But the premise that led the Court in *Hans* to rewrite the Eleventh Amendment—that the Amendment bars federal question cases against a state where diversity of citizenship also happens to exist—is an unsound reading of the constitutional text: although the words of the Eleventh Amendment, if taken in isolation, could bear that interpretation, such a construction fails to take into account other provisions of the Constitution that give a more natural meaning to the Eleventh Amendment, one that does not require the Amendment to be judicially rewritten.

Specifically, we refer to Article III, section 2, of the Constitution, the provision that defines the "Judicial power of the United States." The Eleventh Amendment expressly is addressed to the scope of that power; the Amendment is, in essence, an amendment of Article III; and, as we will show, the critical words of the Amendment are imported directly from Article III. It is thus

essential to look to Article III to illuminate the meaning of the words of the Eleventh Amendment.

Article III, section 2, defines the judicial power of the federal courts by listing the categories of cases to which that power extends.[4] The categories of cases listed are in turn defined by their subject matter or by their parties. Thus, the federal judicial power extends to all federal question cases ("all cases . . . arising under this constitution, the laws of the United States, and treaties made") and all admiralty cases ("all cases of admiralty and maritime jurisdiction") regardless of the identity of the parties to the case. And, by the same token, the federal judicial power extends to diversity cases (including "Controversies . . . between a State and Citizens of another State; . . . and between a State and foreign States, Citizens or Subjects") regardless of the subject matter of the case.

Thus, under the language of Article III, section 2, taken by itself, there are two types of cases in which a state could be sued in federal court by an individual: A state could be sued in federal court when the *subject matter* of the suit is one specified in that provision—for our purposes, when the suit is a federal question case or an admiralty case; or a state could be sued in federal court based on the *identity of the parties*, *e.g.*, when the

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[4] Article III, section 2, provides in pertinent part as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

plaintiff is a citizen of another state or a citizen or subject of a foreign state.

The words used in the Eleventh Amendment to define the category of cases to which the judicial power "shall not . . . extend"—suits brought against states prosecuted "by Citizens of another State, or by Citizens or Subjects of any Foreign State"—are precisely and only the words used in Article III, section 2, to create that part of the *diversity* or *party* jurisdiction in which states could be sued by private parties.[5] By contrast, the Eleventh Amendment does not use or refer to the words of Article III, section 2, that extend the federal judicial power to federal question cases and admiralty cases. In this context, the most natural interpretation of the Eleventh Amendment is that the federal courts' *diversity* or *party* jurisdiction shall not exend to suits against states by private parties.

Thus, to read into the Eleventh Amendment words that are not there—as the *Hans* Court did—is fundamentally to alter the meaning of the constitutional text. For once it is recognized that the words of the Eleventh Amendment are the words used in Article III, section 2, solely to create party jurisdiction, the logic of the Elev-

[5] Article III, section 2, also provides that the federal judicial power extends to cases against states brought by the federal government, another state, or a foreign state. The Eleventh Amendment has been held not to bar a suit by the United States against a state, or by a state against another state, but to immunize states from suits by foreign states. See *Monaco v. Mississippi*, 292 U.S. 313 (1934) (extending *Hans* to hold that the principle of sovereignty implicit in the Eleventh Amendment prohibits unconsented suits by foreign governments against a state, despite the literal terms of that Amendment and of Article III); *South Dakota v. North Carolina*, 192 U.S. 286 (1904) (relying on the literal terms of the Eleventh Amendment and of Article III to sustain jurisdiction over unconsented suits of one state against another); *United States v. Texas*, 143 U.S. 621 (1892) (relying on the literal terms of Article III to sustain jurisdiction over unconsented suits by the federal government against a state).

enth Amendment is apparent: that Amendment excludes from the federal judicial power diversity cases by private parties against states, but not federal question cases. The natural inference is that those words were used in the Eleventh Amendment in the same sense as in Article III, section 2, and were not intended to take on a new and more sweeping meaning. Had the framers of the Eleventh Amendment intended to bar all suits brought in federal courts by private parties against states—including federal question and admiralty cases—they had only to say so. In that event, they would have had no reason to select out, as they did, only suits against states "by Citizens of another State, or by Citizens or Subjects of any Foreign State."

II. THE ORIGINAL UNDERSTANDING OF THE ELEVENTH AMENDMENT

The conclusion reached by analyzing the constitutional text—that the Eleventh Amendment applies only to diversity cases brought by private parties against states based on state law—is reinforced when consideration is given to the background of the Eleventh Amendment.

A. The immediate impetus for adoption of the Eleventh Amendment was this Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). *Chisholm* was a diversity case brought in federal court upon a state law cause of action—*assumpsit*—against a state by a citizen of another state. Chisholm sought to collect a debt allegedly owed by Georgia. By a four to one majority, the *Chisholm* Court ruled that the case could indeed be maintained in a federal court. That ruling was "displaced" with "vehement speed" by the Eleventh Amendment. *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 708 (1949) (Frankfurter, J., dissenting); *see also Hans v. Louisiana, supra*, 134 U.S., at 12.

The dissent of Justice Iredell in *Chisholm* is regarded as embodying the substantive rationale of the Eleventh

Amendment. *See* Fletcher, *A Historical Interpretation of the Eleventh Amendment*, 35 Stanford L. Rev. 1033, 1077 (1983) (hereinafter "Fletcher"); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. Pa. L. Rev. 515, 541 (1978). As the *Hans* Court put it, in light of the Eleventh Amendment there is an "additional interest [in] the able opinion of *Mr. Justice* Iredell on that occasion." 134 U.S. at 12 (emphasis in original). Properly understood, the concepts of sovereignty urged by Justice Iredell support the notion that states should *not* be immune from suit in federal court in federal question or admiralty cases.

In his dissent, Justice Iredell focused on whether by entering into the Union and by agreeing to the Constitution the states had given up their sovereign immunity with respect to suits brought in the federal courts. Justice Iredell understood that the considerations governing this question differ depending on whether a case is a federal question case or a diversity case. Thus, Justice Iredell recognized that the states had "delegated" part of their sovereignty to the United States and, accordingly, that the sovereignty of the states was only in the areas that had not been delegated:

> Every state in the union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of government actually surrendered. Each state in the union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the states have surrendered to them. Of course the part not surrendered must remain as it did before. [2 U.S. at 435.]

With respect to the legislative and executive branches of the federal government, Justice Iredell believed, this bifurcation of sovereignties posed no particular problem:

> The powers of the general government, either of a legislative or executive nature, or which particularly concern treaties with foreign powers, do for the most part (if not wholly) affect individuals, and not states. They require no aid from any state authority. This is the great leading distinction between the old articles of confederation, and the present constitution. [*Id.*]

But, as Justice Iredell put it, "[t]he judicial power is of a peculiar kind." *Id.* The peculiarity, in his view, stemmed from the fact that the judicial power extends to two quite different categories of cases. The first category—like the executive and legislative power of the federal government—simply involves the judiciary in matters wholly encompassed by the federal sovereignty. In this category of cases, the federal judicial power "is indeed commensurate with the ordinary legislative and executive powers of the general government, and the power which concerns treaties." *Id.* This "part of the judicial power . . . relate[s] to the execution of the other authorities of the general government (which it must be admitted are full and discretionary, within the restrictions of the constitution itself). . . ." *Id.* at 432. In present terminology, this "part of the [federal] judicial power" is the power to decide federal question cases.

It is at least implicit in Justice Iredell's discussion of the power of federal courts to decide federal questions that such power could not implicate any question of state sovereign immunity. By his analysis, the states had no sovereignty as to federal questions. "But," in Justice Iredell's words, the federal judicial power "also goes further." *Id.* at 435. And, it was in this "further" extension of the federal judicial power that Justice Iredell found the sovereign immunity of the states to be implicated. For in exercising this part of the federal judicial power—the power to decide diversity cases—the judiciary was not operating as to subject matters within the realm

of federal sovereignty but was instead merely providing a neutral forum for the resolution of issues as to which the states had not given up their sovereignty. Indeed, the source of the legal rights to be resolved in such cases was state law, as to which the states by definition were sovereign.

The following excerpts from Justice Iredell's opinion show that his concerns about state sovereignty were a consequence of these attributes of the diversity jurisdiction and could have no application in federal question cases:

> But [the federal judicial power] also goes further. Where certain parties are concerned, although the subject in controversy does not relate to any of the special objects of authority of the general government, wherein the separate sovereignties of the states are blended in one common mass of supremacy, yet the general government has a judicial authority in regard to such subjects of controversy, and the legislature of the United States may pass all laws necessary to give such judicial authority its proper effect. So far as states under the constitution can be made legally liable to this authority, so far to be sure they are subordinate to the authority of the United States, and their individual sovereignty is in this respect limited. But it is limited no farther than the necessary execution of such authority requires. [*Id.* at 435-436.]
>
> * * *
>
> It follows, therefore, unquestionably, I think, that looking at the [First Judiciary Act], which I consider is on this occasion the limit of our authority (whatever further might be constitutionally, enacted[)] we can exercise no authority in the present instance consistently with the clear intention of the act, but such as a proper state court would have been at least competent to exercise at the time the act was passed.
>
> If therefore, no new remedy be provided (as plainly is the case[)] and consequently we have no other rule to govern us but the principles of the pre-existent [state] laws, which must remain in force till superceded by others, then it is incumbent upon us to enquire, whether previous to the adoption of the Constitution . . . an action of the nature like this before the court could have been maintained against one of the states in the Union upon the principles of the common law, which I have shown to be alone applicable. If it could, I think it is now maintainable here: If it could not, I think, as the law stands at present, it is not maintainable. . . . [*Id.* at 436-437.]

Thus, the Eleventh Amendment was adopted in reaction to this Court's decision in a diversity case and on the heels of Justice Iredell's dissenting opinion which gave a justification for recognition of state sovereign immunity only in diversity cases. It is not surprising therefore that, as we have shown, the text of the Eleventh Amendment is directed only at diversity cases.

While the text of the Amendment, together with its immediate background,[6] should be dispositive, it is worth noting that Justice Iredell's analysis in fact correctly reflected the views of those who enacted and ratified the Constitution. Those materials are exhaustively canvassed in Justice Brennan's dissenting opinion in *Atascadero State Hosp., supra*, 105 S.Ct. at 3158-71. Suffice it to say here that, as those materials show, invariably the issue of state sovereign immunity arose in the context of the diversity jurisdiction clauses of Article III, section 2. That the states would, or at least might, have no immunity from suit in federal courts on federal questions seems not to have been a matter of concern to those who adopted the Constitution.

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[6] The actual legislative history of the Amendment, while not particularly illuminating, is wholly consistent with the interpretation pressed in this brief. That history is described in detail in Justice Brennan's dissenting opinion in *Atascadero State Hosp., supra*, 105 S.Ct. at 3169-3171.

B. Nearly 70 years before the decision in *Hans*, Chief Justice Marshall had occasion to address the meaning of the Eleventh Amendment in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). In that case, this Court sustained its power to entertain a writ of error to a state court on a federal question in a case where the state was a party, having sought to prosecute one of its own citizens. After first concluding that a writ of error is not a "suit" under the Eleventh Amendment, Chief Justice Marshall, writing for the Court, stated as an alternative holding:

> But should we in this be mistaken, the error does not affect the case now before the court. If this writ of error be a suit in the sense of the 11th amendment, it is not a suit commenced or prosecuted "by a citizen of another state, or by a citizen or subject of any foreign state." It is not, then, within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties. [*Id.* at 412.]

The discussion referred to in the above passage respecting "the constitution as originally framed" is as important as this alternative holding, because it sets forth the understanding of Chief Justice Marshall and the *Cohens* Court on the applicability of state sovereign immunity in federal question cases in the federal courts under the Constitution as originally drafted. Chief Justice Marshall began this discussion by making clear that when a sovereign entity has agreed to yield a portion of its sovereignty, it must be understood to have given up as well the immunity from suit that is incidental to the sovereignty it gave up:

> The Counsel for the [state] . . . have laid down the general proposition, that a sovereign independent state is not suable except by its own consent.

> This general proposition will not be controverted. But its consent is not requisite in each particular case. It may be given in a general law. And if a state has surrendered any portion of its sovereignty, the question whether a liability to suit be a part of this portion, depends on the instrument by which the surrender is made. If, upon a just construction of that instrument, it shall appear that the state has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has entrusted that power to a tribunal in whose impartiality it confides. [*Id.* at 380.]

The Chief Justice then went on to find that in joining the Union and agreeing to the Constitution, the states had indeed given up a significant measure of their sovereignty. In particular, he pointed to the Supremacy Clause as the manifestation of that transfer:

> The American States, as well as the American people, have believed a close and firm Union to be essential to their liberty and to their happiness. They have been taught by experience, that this Union cannot exist without a government for the whole; and they have been taught by the same experience that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent states. Under the influence of this opinion, and thus instructed by experience, the American people, in the conventions of their respective states, adopted the present constitution.
>
> If it could be doubted, whether from its nature, it were not supreme in all cases where it is empowered to act, that doubt would be removed by the declaration, that "this constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the consti-

tution or laws of any state to the contrary notwithstanding."

This is the authoritative language of the American people; and, if gentlemen please, of the American States. It marks, with lines too strong to be mistaken, the characteristic distinction between the government of the Union and those of the states. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the constitution; and if there be any who deny its necessity, none can deny its authority. [*Id.* at 380-381.]

On the premises thus established, Chief Justice Marshall concluded that the states had given up their sovereign immunity as to matters now within the sovereignty of the United States:

With the ample powers confided to this supreme government . . . are connected many express and important limitations on the sovereignty of the states, which are made for the same purposes. The powers of the Union, on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the states; but in addition to these, the sovereignty of the states is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on Congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a state may be a party. When we consider the situation of the government of the Union and of a state, in relation to each other; the nature of our

Constitution; the subordination of the state governments to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States is confided to the judicial department, are we at liberty to insert in this general grant, an exception of those cases in which a state may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. *We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case.* [*Id.* at 382-383 (emphasis added.)]

III. THE ERROR OF *HANS*

A. In the face of these authorities, in 1890—almost one hundred years after the Eleventh Amendment was adopted—the *Hans* Court ruled that the Amendment immunizes states from federal question suits brought by private parties in the federal courts. In reaching this result, the *Hans* Court relied primarily on Justice Iredell's dissent in *Chisholm* and on other materials addressed to the question of state sovereign immunity in *diversity* cases. It is clear from the face of the opinion that the Court in *Hans* misunderstood the purport of these materials.

Thus, in discussing the dissent by Justice Iredell, the *Hans* Court acknowledged that the controversy in *Chisholm* centered on the application of state sovereign immunity in diversity cases, but then ignored that limitation in drawing its conclusion:

The other justices were more swayed by a close observance of the letter of the Constitution, without regard to former experience and usage; and because the letter said that the judicial power shall extend to controversies "between a State and citizens of another State;" and "between a State and foreign states, citizens or subjects," they felt constrained to see in this language a power to enable the individual citizens of one State, or of a foreign state, to sue another State of the Union in the federal

courts. *Justice* Iredell, on the contrary, contended that it was not the intention to create new and unheard of remedies, by subjecting sovereign States to actions at the suit of individuals (which he conclusively showed was never done before), but only, by proper legislation, to invest the federal courts with jurisdiction to hear and determine controversies and cases between the parties designated, that were properly susceptible of litigation in courts. [134 U.S. at 12.]

The *Hans* Court similarly mistook the point of a passage from Federalist No. 81, authored by Alexander Hamilton, on which the *Hans* Court heavily relied. Hamilton wrote:

> It has been suggested that an assignment of the public securities of one State to the citizens of another would enable them to prosecute that State in the federal courts from the amount of those securities; a suggestion which the following considerations prove to be without foundation.
>
> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation and need not be repeated here.[7] A recurrence to the

[7] This reference is to Federalist No. 32, in which Hamilton stated three circumstances which "produce an alienation of State sovereignty":

> where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*. [Federalist No. 32 (Hamilton), *The Federalist* (Modern Library Ed.), at 198 (emphasis in original).]

> principles there established will satisfy us that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. [Federalist No. 81 (Hamilton), *The Federalist* (Modern Library Ed.), at 529-530 (emphasis in original).]

As is apparent from Hamilton's description of the issue being addressed—"that an assignment of the public securities of one State to the citizens of another would enable them to prosecute that State in the federal courts for the amount of those securities"—the cause for concern was the diversity jurisdiction, not the federal question jurisdiction. Indeed, implicit in Hamilton's discussion of this issue is that states could be sued in federal courts on federal questions. Thus, Hamilton linked the ability of the states to claim sovereign immunity only to those matters as to which the states would retain their sovereignty. Immunity from suit was "in the nature of sovereignty" and accordingly except as to those matters upon which the Constitution "produce[d] an alienation of State sovereignty" the states would remain immune. By implication, as to those matters upon which the Constitution effected an "alienation of State sovereignty," the states would not be immune.

The *Hans* Court recognized that Federalist No. 81 was addressed to a problem created by the diversity clause, but erroneously assumed without analysis that the same reasoning applied in federal question cases as well:

The obnoxious clause to which Hamilton's argument was directed, and which was the ground of the objections which he so forcibly met, was that which declared that "the judicial power shall extend to all . . . controversies between a State and citizens of another State, . . . and between a State and foreign states, citizens or subjects." It was argued by the opponents of the Constitution that this clause would authorize jurisdiction to be given to the federal courts to entertain suits against a State brought by the citizens of another State, or of a foreign state. Adhering to the mere letter, it might be so; and so, in fact, the supreme court held in *Chisholm v. Georgia*; but looking at the subject as Hamilton did, and as *Mr. Justice* Iredell did, in the light of history and experience and the established order of things, the view of the latter were clearly right,—as the people of the United States in their sovereign capacity subsequently decided. [134 U.S. at 13-14 (emphasis in original.)] [8]

The *Hans* Court did acknowledge that the alternative holding of *Cohens v. Virginia* was contrary to the decision in *Hans*, but the Court dismissed that precedent in the following manner:

> It must be conceded that the last observation of the chief justice does favor the argument of the plaintiff. But the observation was unnecessary to the decision, and in that sense *extrajudicial*, and, though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion. [*Id.* at 20 (emphasis in original).] [9]

[8] Other materials from the constitutional debates cited by the *Hans* Court are similarly addressed to the question of sovereign immunity in the diversity context. 134 U.S. at 14.

[9] The *Hans* Court's dismissal of the alternative holding in *Cohens* as "*extrajudicial*" is contrary to the rule of precedent that "where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*." *United States v. Title Ins. Co.*, 265 U.S. 472, 486 (1924); *Massachusetts v. United States*, 333 U.S. 611, 623 (1948).

The *Hans* ruling, then, was based on a misreading of the words of Justice Iredell and Hamilton, and a disregard for the words of Chief Justice Marshall. Even more, it was based on a disregard for the words of the Eleventh Amendment. Yet this opinion became the foundation for modern analysis of the Eleventh Amendment.

B. The effect of *Hans* is continuing and profound, and thus the error of that decision cannot be considered to have outlived the period in which it profitably might be corrected.

1. This Court has stated that the significance of the Eleventh Amendment "lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984); *see also, Atascadero State Hosp.*, 105 S.Ct., *supra*, at 3145. That statement is of course correct. But as we have seen, the "fundamental principle of sovereign immunity," both in its classical formulation and as understood by this nation's founders, has no application when a state is sued in federal court upon a federal question. In their nature, federal questions are matters as to which the states are not sovereign.

In *Ex parte Virginia*, 100 U.S. 339, 346 (1880), this Court stated: "[E]very addition of power to the General Government involves a corresponding diminution of the governmental powers of the States. It is carved out of them." The obverse is equally true. To grant that states have an immunity from suits brought on matters as to which the federal government is sovereign requires that the powers given to the federal government be diminished. An enhancement of the sovereignty of the states means a corresponding lessening of the sovereignty of the national government. If as we have seen here,

such enhancement was not intended by the Constitution, the constitutional scheme is improperly altered.

2. One hallmark of an unsatisfactory doctrine is the evolution of decisional law that is replete with fictions and anomalies. This Court's Eleventh Amendment jurisprudence stands as a prime example. In an effort to mitigate the effects that otherwise would result from *Hans*, a series of Eleventh Amendment rules have been developed by this Court which are difficult to understand in light of the premises of the doctrine and under which the existence of federal authority often turns on whether a variety of empty formalisms are observed. The problems are so acute that this Court's decisional law on the Eleventh Amendment has been described by one commentator as "a morass." Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. Pa. L. Rev. 1203, 1209 (1978) (hereinafter Field, Part Two). That the sensitive balance between the state and federal power has come to depend on *ad hoc* adjustments to the rigor of the *Hans* rule is reason enough to reconsider the rule.

a. Various provisions of the Constitution place limitations on the powers of the states and confer rights on individuals as against the states. If left undiminished, *Hans* would have permitted the states to flout these constitutional commands—and to violate constitutional rights—without being subject to any court enforcement or sanction.[10] To mitigate these consequences, the Court in *Ex parte Young*, 209 U.S. 123 (1908), held that the Eleventh Amendment does not bar federal court actions against a state officer in his official capacity even though "official-capacity suits generally represent only another

[10] The statement in text is certainly true with respect to enforcement or sanction in the federal courts, and presumably true as well for enforcement or sanction in the state courts. See *infra* at 26-28.

way of pleading an action against an entity of which an officer is an agent," *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 n.55 (1978).

The doctrine of *Ex parte Young* gives the federal courts some power to enforce constitutional guarantees and to issue decrees that effectively bind the states. Indeed, as the Court observed in *Edelman v. Jordan*, *supra*, under that doctrine, where a state has been proven to have acted unlawfully, the federal courts may remedy the violation by issuing affirmative injunctions whose "necessary result" is to impose "fiscal consequences [on] state treasuries." 415 U.S. at 667-668. Yet the Court in *Edelman* held that a judgment requiring that even a penny of compensation be paid to make whole the victim of the state's wrong is barred by the Eleventh Amendment on the theory that such an award "resembles far more closely [a] monetary award against the State itself." *Id.* at 665.

The Court in *Edelman* acknowledged that "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night." *Id.* at 667. Subsequent cases bear that statement out and draw lines more nice than obvious between decrees having "an ancillary effect on the state treasury [which] is permissible," *id.* at 668, and decrees which "resemble[] far more closely [a] monetary award against the State itself," *id.* at 665. *See Hutto v. Finney*, 437 U.S. 678, 689-693 (1978); *Quern v. Jordan*, 440 U.S. 332 (1979).

b. Insofar as *Hans* immunizes the states from any liability for violating federal law, the decision effectively diminishes Congress' delegated powers, including its power to regulate interstate commerce. *See also* pp. ———, *supra*. Unease with this consequence has led the Court to experiment with varying formulations for determining when a state, by engaging in a federally-regulated activity, may be said to have waived its Elev-

enth Amendment protection against federal question suits. *Compare Parden v. Terminal R. Co., supra,* 377 U.S. at 192-197, with *Edelman v. Jordan, supra,* 415 U.S. at 671-675, and *Atascadero State Hosp. v. Scanlon, supra,* 105 S.Ct. at 3145 n.1, 3147.

Moreover, the Court has suggested under the Commerce Clause, and has held under the fifth section of the Fourteenth Amendment, that in exercising its power Congress can "lift" or "abrogate" the states' Eleventh Amendment immunity. *Employees v. Missouri Health Dept., supra,* 411 U.S. at 283, 285, 287; *Atascadero State Hosp. v. Scanlon, supra,* 105 S.Ct. at 3145; *see also Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976). And the Court has developed a set of unique rules of statutory construction to determine whether Congress has effectively overridden the states' immunity. *See Atascadero State Hosp. v. Scanlon, supra.*

These decisions save some of Congress' power from the incursions that otherwise would result from *Hans.* But it is difficult to square the decisions just mentioned with the premise of *Hans, viz.,* that the Eleventh Amendment grants the states a *constitutional* immunity from federal question suits. *See Field,* Part Two, 126 U. Pa. L. Rev. at 1209-1218, 1230. And a doctrine under which federal authority depends upon the form of words used by Congress in exercising a sovereign authority demeans both Article I and the Eleventh Amendment.

c. In a final effort to mitigate the impact of *Hans,* the Court has grappled with but has not resolved the question whether the states must entertain suits in their own courts to enforce federal rights. Justice Marshall broached the issue in his concurring opinion in *Employees v. Missouri Public Health Dept.,* in which he stated:

> While constitutional limitations upon the federal judicial power bar a federal court action by these employees to enforce their rights, the courts of the State nevertheless have an independent constitutional obligation to entertain employee actions to enforce those rights. See *Testa v. Katt,* 330 U.S. 386 (1947). See also *General Oil Co. v. Crain,* 209 U.S. 211 (1908). [411 U.S. at 298.]

The Court in *Atascadero State Hosp., supra,* 105 S.Ct. at 3146 n.2, seems to have given some credence to this view:

> Justice BRENNAN's dissent also argues that in the absence of jurisdiction in the federal courts, the States are "exempt[] . . . from compliance with laws that bind every other legal actor in our nation." *Post,* at 3150. This claim wholly misconceives our federal system. As Justice MARSHALL has noted, "the issue is not the general immunity of the States from private suit . . . but merely the susceptibility of the States to suit before *federal tribunals.*" *Employees v. Missouri Public Health & Welfare Dept., supra,* 411 U.S., at 293-294, 93 S.Ct., at 1622-1623 (MARSHALL, J., concurring in the result) (emphasis added). It denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land. See *Martin v. Hunter's Lessee,* 1 Wheat. 304, 341-344, 4 L.Ed. 97 (1816). See also *Stone v. Powell,* 428 U.S. 465, 493, n.35, 96 S.Ct. 3037, 3052, n.35, 49 L.Ed. 1067 (1976), and *post,* at 3155, n.8.

Thus, to assure that federal rights are fully enforceable as against the states the Court has suggested that, as a matter of federal law, state courts may be compelled to entertain federal law claims against states, notwithstanding whatever sovereign immunity the states otherwise enjoy from being sued in their own courts. But, of course, this "solution" to the problem posed by *Hans* would turn our system of bifurcated sovereignties on its head by requiring the federal government to rely on state courts for enforcement of federal

statutory and constitutional rights. *See* Fletcher, *supra*, 35 Stanford L. Rev. at 1098. The "fundamental principle of sovereign immunity," which purportedly requires protection of the states against federal question suits in the federal courts, would under this view provide them no similar protection in their own courts.

These problems of Eleventh Amendment jurisprudence are all attributable to the "wrong turn" taken in *Hans*.[11] A return to the principles intended by the framers of the Eleventh Amendment would eliminate these problems. The federal government would be given back the full measure of sovereignty intended by the Constitution. And no fictions or artificial constructions would be necessary to permit the federal government to do its intended job.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

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[11] See Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 Harv. L. Rev. 61 (1984).

No. 85-1716

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

JEAN E. WELCH,
Petitioner,

v.

STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION AND THE STATE OF TEXAS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether a United States district court has jurisdiction to entertain a Jones Act suit against the State of Texas in light of the jurisdictional limitations on suits against the States implicit in Article III, as confirmed by the Eleventh Amendment.

2. Whether the State of Texas has consented to a Jones Act suit in the federal court.

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

This case poses a direct assault on one of the foundations of our system of federalism: the constitutional limitation on the federal judicial power to assert jurisdiction over private suits against the States. This limitation on the federal courts' Article III power, confirmed by the Eleventh Amendment, reflects the original

understanding that if the States are to be subject to private suit, they are entitled to have those suits maintained in their own courts, rather than the federal courts.

The issue here is not *Congress'* admiralty or maritime power, or its authority under the Commerce Clause, to regulate the employment of seamen by the States. The issue is purely and simply one of jurisdiction: the assertion of the federal *judicial* power over one of the sovereign States without its consent.

Amici believe that petitioner's assumption that only the federal courts can afford her an adequate remedy is an affront to the integrity of the States' own judicial systems. As this Court underscored only recently, it "denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land." *Atascadero State Hospital v. Scanlon*, 105 S. Ct. 3142, 3146 n.2 (1985). The state courts are fully empowered to hear Jones Act suits. To invoke the rhetoric of "a right without a remedy" thus improperly deflects the debate from its appropriate focus: whether an individual may hale an unwilling State into federal court to account for a personal injury claim.

Amici submit that the decision below is correct. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT OF THE CASE

This case presents the question whether the Eleventh Amendment precludes a federal court from assuming jurisdiction over a Jones Act claim brought against the State of Texas by one of its citizens. Petitioner Jean

[1] Pursuant to Rule 36 of Rules of the Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

Welch is an employee of the Texas Department of Highways, which operates a free passenger ferry between Point Bolivar and Galveston, Texas. Ms. Welch was injured in the course of her duties as a marine technician on the ferry landing dock at Galveston. Although entitled to workers' compensation benefits under state law, petitioner instead brought this action in federal court against the State of Texas and its Department of Highways and Public Transportation pursuant to the Jones Act, 46 U.S.C. § 688.

The district court dismissed the suit because it determined that both defendants were immune from suit under the Eleventh Amendment. On appeal, the United States Court of Appeals for the Fifth Circuit reversed. 739 F.2d 1034 (1984). Sitting *en banc*, the Fifth Circuit on rehearing set aside the panel's judgment and affirmed the district court's dismissal. 780 F.2d 1268 (1986).

SUMMARY OF ARGUMENT

Federal district courts do not possess Article III jurisdiction to entertain a private suit against a State. For this reason, the district court below was without jurisdiction over this Jones Act claim against the State of Texas. Congress has no power to override that constitutional limitation. This case thus presents no occasion for determining any question of congressional intention, or power, to regulate the States. This Court should affirm the dismissal below without consideration of the merits, including the issue whether a State is, or permissibly might be, subject to Jones Act liability.

The Eleventh Amendment clarifies the Framers' understanding that Article III does not extend federal jurisdiction to citizen and alien suits against the States. The principal purpose of the Amendment was to protect the States from being called to account in the courts of a "higher sovereign," the United States, and the Amend-

ment reflects the Framers' concern for the continued sovereignty of the States in a National government.

But to say that the Eleventh Amendment reflects concern for state sovereignty is not to say that it embodies the doctrine of sovereign immunity as it existed at common law. Absolute state sovereign immunity is not compatible with a constitutional structure in which the States surrendered a portion of their sovereignty and voluntarily submitted their law to an overriding federal law. The proponents of the Amendment, reflecting the popular sentiment at the time of the framing of the Constitution itself, did not attempt to upset the principle of federal supremacy. The Eleventh Amendment reflects a more discrete, but more emphatic, limitation on federal authority than would any attempt to inject the substantive doctrine of state sovereign immunity into the Constitution. It defines a firm limitation on the *jurisdiction* of the federal *courts*, which possess only the jurisdiction that the Constitution affirmatively grants and no more. However much the States agreed to submit themselves to federal *legislative* authority under the new constitutional scheme, the history of the Eleventh Amendment teaches that the States did not also agree to submit to the indignity of being called to account as ordinary litigants in the federal courts by individual suitors.

The analysis employed by the court below tended to confuse the initial jurisdictional inquiry with the various substantive law issues raised when Congress enacts a regulatory scheme facially broad enough to encompass the States. That confusion mirrors a mode of analysis first employed in *Parden v. Terminal Railway*, 377 U.S. 184 (1964), where, in contrast to this Court's more careful recent explications of the Eleventh Amendment, the Court tended to view the Amendment as the embodiment of the common law doctrine of sovereign immunity, rather than as a jurisdictional bar to suit. Thus, the *Parden* opinion failed adequately to differentiate between the *substantive* issue of Congress' power to create a cause of action against a State and the *jurisdictional* question whether such a cause of action, once created, could be pursued against a State in a *federal court*. This admixture provided the foundation for *Parden*'s expansive approach to State "consent."

Amici urge this Court to reject that expansive view as inconsistent with the jurisdictional premises underlying Article III, and to hold that there is no federal jurisdiction over the petitioner's claim against the State of Texas. Although a State may give its consent to be sued in a federal court, such consent is not to be readily implied. Because the State of Texas has not consented to federal court jurisdiction under the Jones Act, the Eleventh Amendment bar is fully operative in this case. The Court should leave for another day the question whether the Jones Act authorizes suit against a State. The state courts are fully qualified to answer this question in the first instance.[2]

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[2] In this brief, *amici* argue that the Eleventh Amendment proscribes private suits against unwilling States in federal court as a matter of *constitutional* law. Even were this Court to conclude otherwise, there are two related *statutory* bases for affirming the lower court's decision in this case. Because of the States' special role in our federal system, Congress is obliged unequivocally to express its intention any time that it seeks to (1) subject a State to federal court jurisdiction or (2) subject a State to liability.

Here, neither plain statement requirement has been met. *First*, we submit that there has been no direct, express indication by Congress in the Jones Act to hold a State liable to suit in federal court. The Jones Act itself contains no separate jurisdictional provision, but merely one of venue. *See Panama R.R. v. Johnson*, 264 U.S. 375, 384-85 (1924). And neither the grant of general federal question jurisdiction nor admiralty jurisdiction should be read specifically to encompass this type of suit against a State. *Second*, as the State of Texas persuasively argues in its brief, because there is no clear indication in the Jones Act or its legislative history that Congress intended to subject the States to liability under the statute, it must be held not to apply here.

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION OVER PETITIONER'S JONES ACT CLAIM AGAINST THE STATE OF TEXAS.

A. The Eleventh Amendment Reflects A Jurisdictional Limitation On The Power Of Federal Courts To Entertain Private Suits Against States.

The Eleventh Amendment is an express limitation on the federal judicial power,[3] barring federal courts from exercising that power in suits brought by private citizens against a State. While the Amendment reflects the same respect for state sovereignty that underlies ancient principles of sovereign immunity, it does not incorporate that common law doctrine. Indeed, it makes no reference to sovereign immunity in any form. Rather, the Amendment speaks in the emphatic language of jurisdiction, defining, or refining, the limited delegation of power to the federal courts under Article III.

The story of the Eleventh Amendment's emergence as a reaction to this Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), has been often told. *Chisholm* involved an action brought by a South Carolina citizen against the State of Georgia pursuant to Article III's grant of jurisdiction over "Controversies . . . between a State and Citizens of another State . . . ." The Court found jurisdiction, holding that the State's claim that it could not be made an involuntary defendant in federal court was belied by the express language of Article III. The decision in *Chisholm*, only four years after the ratification of the Constitution, "created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted." *Monaco v. Mississippi*, 292 U.S. 313, 325

[3] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

U.S. Const. Amend. XI.

(1934). The Nation's response when *Chisholm* came down—and the pervasive sense that it somehow upset the States' role in the constitutional plan—is difficult to square with a narrow, technical reading of the purpose behind the Eleventh Amendment. Although there has been much discussion about the precise scope of the Amendment,[4] all agree that its aim was to overturn *Chisholm*.[5]

The fact that the Eleventh Amendment grew out of a controversy over the scope of Article III's grant of federal judicial power is crucial to a proper understanding of the Amendment. Prior to the ratification of the Constitution, the provision in Section 2 of Article III concerning "Controversies . . . between a State and Citizens of another State," despite its plain language, was understood and explained by many as *not* encompassing private suits in which States were made unwilling defendants in federal court. *See Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 292 (1973) (Marshall, J., concurring); *The Federalist* No. 81 (A. Hamilton); 1 C. Warren, *The Supreme Court in United States History* 91 (rev. ed.

[4] *See Atascadero*, 105 S. Ct. 3142, 3150-78 (Brennan, J., dissenting); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. Pa. L. Rev. 515 (1978); Fletcher, *A Historical Interpretation of the Eleventh Amendment*, 35 Stan. L. Rev. 1033 (1983); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889 (1983).

[5] One major newspaper proclaimed that the decision would lead to the overthrow of the State governments and to the "downfall of liberty and the subversion of the rights of the people. . . ." 1 C. Warren, *The Supreme Court in United States History* 97 (2d ed. 1926). Indeed, the Georgia House of Representatives became so excited that it passed a bill providing that anyone attempting to execute process in the *Chisholm* case should be declared "guilty of felony and shall suffer death, without benefit of clergy, by being hanged." *Id.* at 100. Although the Framers can be read both ways on the question whether, under the original Document, States could be made subject to suit in federal court, the reaction engendered by *Chisholm* suggests that, Framers aside, *Chisholm* was not what they, the populace and the ratifying States, had in mind.

1937). It was this understanding that *Chisholm* challenged and that the Eleventh Amendment's speedy ratification served to restore. This swift reaction by the same population that approved the Constitution suggests a clarifying purpose: *i.e.*, that the Court in *Chisholm* misconstrued the language of Article III, necessitating the corrective action of the Eleventh Amendment to prohibit that construction and restore the original understanding. *See Employees*, 411 U.S. at 292 (Marshall, J., concurring).

Consistent with this view, this Court, in *Hans v. Louisiana*, 134 U.S. 1 (1890), found in the Eleventh Amendment the confirmation of a broader, pre-existing jurisdictional limitation. By its literal terms, the Eleventh Amendment forbids federal jurisdiction only over suits against a State by "Citizens of another State, or by Citizens or Subjects of any Foreign State." It makes no mention of suits brought against a State by one of its own citizens. The historical explanation for this, suggested by *Hans*, is straightforward: the Eleventh Amendment dealt with the only situation in which the Constitution *by its express terms* had suggested that a State could be subject to federal court suit. Although there was much concern with the only explicit grant of jurisdiction over cases against States, few persons even considered the possibility that a State could be sued in federal court by its own citizens under the federal question clause. *See* C. Jacobs, *The Eleventh Amendment and Sovereign Immunity* 110 (1972). Thus, the Court in *Hans* read the limitations on the federal judicial power exemplified by the Eleventh Amendment as applying with equal force to suits brought against a State by one of its own citizens.[6] 134 U.S. at 14-15. *Hans* stands for the straightforward proposition that under our federal system

[6] To read it otherwise would have resulted in the curious anomaly that citizens of a State would have had a federal judicial remedy against their own State which, by virtue of the Eleventh Amendment, was denied to citizens of other States and to aliens. *See* C. Jacobs, *The Eleventh Amendment and Sovereign Immunity* 110 (1972).

a State is not an ordinary litigant; whatever else the States may have contemplated in surrendering some portion of their sovereignty to the federal union, they did not unblinkingly accept that they were thereby subjecting themselves to suit by individuals in federal court.

This Court's cases have, with only slight deviation,[7] likewise described the Amendment and *Hans* in terms of the simple jurisdictional statement that the constitutional grant of authority to the federal courts did not contemplate any form of suit by individuals against unwilling States. *See, e.g., Atascadero*, 105 S. Ct. at 3145; *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98-99 (1984); *Nevada v. Hall*, 440 U.S. 410, 420 (1979); *Monaco v. Mississippi*, 292 U.S. at 329; *Missouri v. Fiske*, 290 U.S. 18, 25-26 (1933). Thus, in *Ex Parte State of New York, No. 1*, 256 U.S. 490 (1921), the Court explained:

> That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court *that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given*: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification.

Id. at 497 (emphasis added) (citations omitted).

Developing this understanding, this Court in *Pennhurst* described the Eleventh Amendment as "a constitutional limitation on the federal judicial power" which "deprives federal courts of any jurisdiction" to entertain claims

[7] *See Parden v. Terminal Railway*, 377 U.S. 184 (1964), discussed *infra* at 21-28.

against a State by either its citizens or those of another state. 465 U.S. at 98-99 & 99 n.8. "The Amendment thus is a specific constitutional bar against hearing even *federal* claims that otherwise would be within the jurisdiction of the federal courts." *Id.* at 120; *see also Kentucky v. Graham*, 105 S. Ct. 3099, 3106 n.4 (1985). This understanding is further reflected in this Court's recognition that, as an issue of jurisdiction, an Eleventh Amendment claim may be raised at any point in a proceeding: "The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that the Court will consider the issue arising under this Amendment . . . even though urged for the first time in this Court." *Pennhurst*, 465 U.S. at 99 n.8, *quoting Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 467 (1945). *See also Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.18 (1982); *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974).

B. The Eleventh Amendment Is Not A Literal Embodiment Of The Sovereign Immunity Doctrine.

Although *Hans* is best understood, and has long been read by this Court, in these simple jurisdictional terms, its repeated references to sovereign immunity as the historical wellspring of its holding seem to have led to considerable controversy in this Court's recent Eleventh Amendment jurisprudence. *Amici* are mindful that four members of this Court have recently subjected *Hans* to a serious and lengthy critique, suggesting that *Hans* misconstrued the historical record, or that later cases have misconstrued *Hans*. *See generally Atascadero*, 105 S. Ct. at 3150-80 (Brennan, Marshall, Blackmun, and Stevens, JJ., dissenting). The critique mistakenly focuses, we think, on the strawman of sovereign immunity rather than the simple jurisdictional principle that is at the heart of the Amendment and *Hans*. Considerations of both history and logic cast doubt on the viability of this revisionist view.

In essence, this revisionist critique seeks a narrow reading of the Amendment as providing protection for state sovereign immunity in only those state law suits that come to the courts under the diversity clauses; conversely, it views the Eleventh Amendment as having no application to federal question cases. This interpretation is premised largely on the fact that the Amendment was adopted in reaction to *Chisholm*, a diversity case in which the State's claim of sovereign immunity was given short shrift. As the critique goes, federal question cases, by their nature, involve a supervening federal authority against which the state law defense of sovereign immunity can afford no logical bar. Thus, the critique draws historical support from the views of some of the Framers and draws its conceptual basis from the supremacy of federal law. Neither rationale, however, carries sufficient force to cast serious doubt on this Court's current view of the Eleventh Amendment and its origins.

1. *A narrow view of the Eleventh Amendment fails convincingly to account for the swift and decisive reaction to* Chisholm.

The speed with which the States acted to overturn *Chisholm* suggests that something about that decision was fundamentally at odds with the widespread understanding of the Constitution ratified only four years before.[8]

[8] It must be emphasized that although the Eleventh Amendment was clearly aimed at overturning the *result* in *Chisholm*, as everyone seems to agree, it was probably not a direct response to the Court's opinion or a specific endorsement of Justice Iredell's dissent. It is doubtful that either the proponents of the Amendment or the state legislatures that ratified it had ready access to the Court's opinion, much less were familiar with it. *See* Baker, *Federalism and the Eleventh Amendment*, 48 U. Colo. L. Rev. 139, 144 (1977). Dallas' official report of *Chisholm* was not published until after Congress and the necessary number of States had acted to overturn the case; and although the Clerk of the Court did issue a summary of opinions to the press, *Chisholm*'s summary was not issued until the day after the Eleventh Amendment was introduced. *Id.* at 144 n.29, *citing* 1 C. Warren, *The Supreme Court in United States History* 94 n.1 (1922).

To read this swift reaction as reflecting nothing more than a desire to effect a technical revision of the diversity clauses places far too fine a point on the views of certain contemporaneous commentators and disregards the Eleventh Amendment's broader historical context.[9]

The Nation's reaction to *Chisholm* may, in part at least, be rooted in a sense of betrayal. At the time of the Constitution's ratification, many States were troubled that Section 2 of Article III could be read to allow an individual to sue a State in federal court and, on this basis alone, several States were prepared to vote against ratification.[10] Some States were so concerned that they proposed amendments that would clarify in no uncertain terms that nothing in the Constitution could "be construed to authorize any suit to be brought against any state, in any matter whatever." *See* 2 *Elliott's Debates* 409 (submitted to the First Congress by the New York Convention). Ultimately, however, it was the forceful political advocacy of Federalists Hamilton, Madison, and Marshall that allayed these fears by stressing unequivocally that the Clause could not legitimately be read to authorize private suits against the States in the federal

[9] The visceral reaction to *Chisholm*, following so closely upon the ratification of the Constitution itself, may speak more eloquently on the intended scope of Article III than the statements of one or another Founding Father. The difficulties of attributing some single purpose or intention to the proponents of the Constitution to guide the interpretation of that Document are well known. *See, e.g.*, J. Ely, *Democracy and Distrust* 1-41 (1980). The voices of the Framers are not always in accord, and the concerns of the States that ratified the Document, and of the populace whose collective will is presumably reflected in it, are many and varied. *See id.* at 17.

[10] *See* 3 J. Elliott, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 319, 475-76, 543 (2d ed. 1836) (statements of Patrick Henry) [hereinafter cited as *Elliott's Debates*]; *id.* at 527 (statement of George Mason); *Pamphlets on the Constitution of the United States* 309 (P. Ford ed. 1888) (statement of Richard Henry Lee).

courts.[11] Professor Warren is surely right that it was this Federalist assurance that provided one of the final catalysts for the ratification of the Constitution. 1 C. Warren, *The Supreme Court in United States History* 91 (2d ed. 1926). Only four years later, *Chisholm* rendered that assurance a mockery.[12]

[11] For example, Madison responded to Patrick Henry's worries by insisting that under the new Constitution, "[i]t is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring suit against a citizen, it must be brought before the federal court." 3 *Elliott's Debates* 533. Hamilton similarly assured the States that

> [i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. . . . [T]here is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. . . . To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.

The Federalist No. 81, at 511-12 (A. Hamilton) (B. Wright ed. 1961).

[12] This was aptly expressed by an editorial that appeared in Boston's *Independent Chronicle:*

> [*Chisholm*'s] novelty is not less striking than the importance of the consequences which may result from an acquiescence in this stride of authority. . . . When the persons in opposition to the acceptance of the new Constitution hinged on the Article respecting the power of the Judiciary Department being so very extensive and alarming as to comprehend even the State itself as a party to an action of debt, this was denied peremptorily by the Federalists as an absurdity in terms. But it is now said that the eloquent and profound reasoning of the Chief Justice has made that to be right which was, at first, doubtful or improper.

(*quoted* in 1 C. Warren, *The Supreme Court in United States History* 96 (2d ed. 1926)).

Put simply, the lesson of *Chisholm* is that the sophisticated analysis of a majority of this Court, only four years after the Constitution's ratification, failed to reflect the pronounced sentiments of the people about the meaning of the Document that they had ratified. For those who reacted to *Chisholm*, the thought that the States could be brought to heel in the federal courts at the whim of an individual suitor was simply intolerable. The notion raised a host of conceptual and practical problems that they had never intended to import into the constitutional scheme. In particular, there was the vexing question of how a federal court judgment would be enforced against a State, a concern referred to repeatedly in the ratification debates.[13] *See, e.g.*, 3 *Elliott's Debates* 526-27 (statement of George Mason); *The Federalist* No. 81, at 511-12 (A. Hamilton) (B. Wright ed. 1961). These comments serve to emphasize that it was difficult for many people to envision the States as ordinary litigants in the federal courts or to believe that the Constitution had impliedly reduced the States to that status.

The jarring notion of unwilling States' being haled by individuals before the federal courts would appear to have little to do with what "head of jurisdiction" the case had been brought under. To be sure, there was little discussion or concern with the question whether the States could be made subject to federal court suit on a federal claim. But that silence cannot be taken as acceptance of the proposition that the States could be made subject to suit in those circumstances. The Amendment addressed the immediate concern raised by *Chisholm* and focused on the only situation in which the possibility of suit against a State had been *expressly* mentioned in the Constitution. Although the historical record is probably too sparse to be decisive, the fact that the few documents of the Eleventh Amendment's day failed to recognize explicitly the possibility of suit against a State on a federal claim, and to distinguish it from the diversity context, suggests that such a suit would have been viewed as equally improbable.[14]

Hans, we think, correctly discerned that a reservation against such suits was implicit in Article III and that Article III did not contemplate that an unwilling State

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[13] George Mason, speaking at the Virginia convention, protested:

> Is not this disgraceful? Is this state to be brought to the bar of justice like a delinquent individual? Is the sovereignty of the state to be arraigned like a culprit, or private offender? Will the states undergo this mortification? I think this power perfectly unnecessary. But let us pursue this subject further. What is to be done if a judgment be obtained against a state? Will you issue a *fieri facias*? It would be ludicrous to say that you could put the state's body in jail. How is the judgment, then, to be enforced? A power which cannot be executed ought not to be granted.

3 *Elliott's Debates* 527.

[14] *Amicus* AFL-CIO makes much of the "alternative holding" of *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), suggesting that one of the reasons that this Court has jurisdiction to review federal questions on appeal from state court judgments, despite the Eleventh Amendment, is because the federal courts possess jurisdiction over federal claims without regard to the parties, and that jurisdiction is unaffected by the Eleventh Amendment. Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* Supporting Petitioner, at 16-19, 22-23.

Cohens' primary rationale, drawing a distinction between suits initiated in the lower federal courts and matters that reach this Court on review, is better reasoned: the Eleventh Amendment is no bar to Supreme Court judisdiction because a writ of error to the Supreme Court is not a "suit" within the meaning of the Amendment. That narrower rationale better reflects the constitutional plan. As Justice Holmes once explained, there would be little harm to the Union if the lower federal courts could not entertain federal question suits against a State in the first instance; for the state courts are always available to adjudicate federal claims. The Union might be imperiled, however, if this Court did not have judisdiction to review state court judgments and the States were free to apply and develop their own idea of federal law without restraint. *See* O. Holmes, *Collected Legal Papers* 295-96 (1920).

Indeed, at the heart of *Cohens* is the notion that the state courts play a significant role as the first-line adjudicators of federal rights.

qua State could be sued as an ordinary litigant in the federal courts; such a suit was beyond the reach of the federal courts' assigned jurisdiction, as commonly understood. *Amici* believe that the *Hans* Court correctly gleaned that understanding from the Nation's dramatic reaction to the contrary decision in *Chisholm*.

2. *The Eleventh Amendment did not import sovereign immunity into the Constitution.*

On occasion the proponents, but more frequently the detractors, of *Hans* have put forward the view that the Eleventh Amendment merely reaffirmed the doctrine of state sovereign immunity, giving it some constitutional significance. For the proponents of a broad prohibition on federal suits against the States, the references to sovereign immunity have served to provide an ancient authority for their interpretation. For the limiters of the Eleventh Amendment, however, these same references have revealed a fundamental flaw in the attempt to extend Eleventh Amendment principles to federal question cases—one that appears to strike at the heart of federal supremacy. Although the opinion in *Hans* is less than perspicuous, *amici* believe that the Court in that case made no attempt to read into the Constitution any form of sovereign immunity. To incorporate the doctrine of sovereign immunity into the Constitution, whether for a federal or a state claim, would have been inconsistent with certain basic constitutional premises.[15]

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[15] Indeed, it was widely understood at the time of ratification that, as a practical matter, sovereign immunity was virtually a dead letter. So rarely was the doctrine invoked at common law that its continued existence could legitimately be subject to question. *See* Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889, 1895-99 (1983). As Judge Gibbons explains, the history of late 18th century America dispels the notion that governmental immunity was an accepted doctrine at the time. *Id.* at 1896. Thus, if the reaction to *Chisholm* and adoption of the Eleventh Amendment are to be understood as the reflection of popular sentiment, it is hard to believe that popular sentiment could be so swiftly mobilized around a theme as unpopular as the reaffirmation of sovereign immunity. *Ibid.*

First, the common law doctrine of sovereign immunity would have been a difficult idea to accommodate within the structure of the federal system. Fundamental to the constitutional scheme was the understanding that the Federal Government was the "higher sovereign" within its designated sphere of authority. Although the analogy is imperfect, for the States to assert the defense of sovereign immunity in the courts of that higher sovereign, the United States, would likely have been viewed as akin to a lord laying claim to sovereign immunity in the courts of the king. *See Nevada v. Hall*, 440 U.S. 410, 418 (1979). In short, the notion of the supreme Union precludes the idea that a State could claim a special immunity to a federal law claim. Indeed, it apparently never occurred to the majority in *Chisholm* that Georgia could be sued in federal court but still assert sovereign immunity as a defense to the claim.

Second, it was well understood that the federal courts possessed only the limited jurisdiction conveyed by the Constitution (and the even narrower jurisdiction statutorily assigned by Congress). The Framers perceived the federal government in general, and the federal courts in particular, as possessing only the limited powers that were expressly assigned to them. The Eleventh Amendment filled the only apparent crack in the wall—a crack caused by the seemingly plain language of Article III—against allowing a suit against a State to proceed in federal court. It did so by employing jurisdictional language. If that Amendment exemplified some larger principle, that principle was not "sovereign immunity," a substantive defense to certain claims, but rather an understanding of a limited judiciary Article of the Constitution under which the States would not be treated as ordinary defendants in federal court suits.[16]

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[16] We can assume that if the proponents of the Amendment merely wanted to import state sovereign immunity into the Con-

In short, quite apart from the history of the Amendment, the logic of the Constitution commends that *Hans* be understood as describing a jurisdictional exclusion to the otherwise broad reach of Article III.

3. *The Eleventh Amendment does not restrict Congress' substantive lawmaking authority.*

Just as it is a mistake to view *Hans* and its progeny as involving a "general expansion of a constitutional sovereign immunity doctrine," *Atascadero*, 105 S. Ct. at 3178 (Brennan, J., dissenting), it is also a mistake to view *Hans* as "limiting the ability of Congress to take steps it deems necessary and proper to achieve national goals within its constitutional authority." *Ibid.* *Hans* does not "impose substantive limits on [Congress'] lawmaking authority" (105 S.Ct. at 3172), nor does it suggest a limitation irreconcilable "with any principled view of congressional power." *Id.* at 3178-79 (Blackmun, J., dissenting).

On the contrary, *Hans* simply restricts the power of the lower federal courts, without imposing any limits on Congress' lawmaking authority. That authority does not rest on state submission to the jurisdiction of the federal courts, but upon federal legislative primacy under the Supremacy Clause. The Supremacy Clause establishes the basic hierarchy of the federal system, by providing that the federal Constitution, laws, and treaties are "the supreme Law of the Land," and binding on "the Judges in every State." U.S. Const., Art. VI, cl. 2. Plainly, the Framers contemplated a substantial role for the courts of the individual States in the enforcement of federal law.[17] It denigrates those courts to suggest that

stitution, they would have chosen words to voice that sentiment directly, rather than speak in jurisdictional terms.

[17] For many years, the state courts were the primary guarantors of federal rights. The respective roles of the state and federal courts changed somewhat after the Civil War with the grant of civil rights and general federal question jurisdiction to the federal district courts. The federal courts thereupon came to be viewed

they cannot handle effectively suits brought under federal laws like the Jones Act.[18] *See Atascadero*, 105 S. Ct. at 3146 n.2; *Employees*, 411 U.S. at 298 (Marshall, J., concurring).

Moreover, it bears recalling that the joining of the sovereign States into the Federal Union, and the submission of the States to overriding federal law, was not without some resistance on the part of the States at the time of ratification. Although the States ultimately elected to surrender the most significant aspect of their sovereignty by subordinating their law to federal law, that surrender of sovereignty was not unqualified. The States joined a union in which they expected to maintain a special identity. The broad sweep of Article I, combined with the Supremacy Clause, has left little opportunity to identify and give effect to the residuum of independence retained by the States. But the adoption of the Eleventh Amendment does provide one clear, historically based expression of State resistance to federal overreaching. The States, in exchange for the compact among them, agreed to subordinate their laws to the laws of the Union. But it was no part of that exchange, and the States actively resisted, the indignity of being compelled to appear in the federal courts, at the whim of a private suitor, as ordinary defendants. The fundamental right of a State to have suits against it heard and determined in its own courts was, for many, implicit in the constitutional plan.

This understanding of the Eleventh Amendment—that it reinforces a preexisting jurisdictional limitation im-

as the primary protectors of individual rights. *See Mitchum v. Foster*, 407 U.S. 225, 241-42 (1972).

[18] State courts of general jurisdiction are fully competent to hear Jones Act suits (*see O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 43 (1943); *Engel v. Davenport*, 271 U.S. 33, 37-38 (1926)), and the judges of those courts are co-equal partners with the members of the federal judiciary in the enforcement of federal law and the Federal Constitution. *See Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 339-44 (1816).

plicit in Article III—reduces much of the tension that has surrounded the debate about the scope of the Amendment. On the one hand, the jurisdictional nature of the Eleventh Amendment leaves it wholly immune from congressional abrogation; Congress cannot grant to the federal courts jurisdiction denied to those courts by Article III.[19] On the other hand, the declaration that certain suits may not be brought in federal court does not, in itself, constrain the exercise of Congress' *substantive* lawmaking power. Congress remains empowered to subject the States to regulatory control when States embark on activities properly subject to federal control. The rights that Congress creates against States can presumptively be vindicated within the judicial systems of the several States; nothing in the Eleventh Amendment or *Hans* would prevent that vindication.[20] In short, a clear understanding of *Hans* and the Eleventh Amendment as firm jurisdictional limitations on federal courts, stripped of the baggage of sovereign immunity, serves to relieve the tension in the Court's Eleventh Amendment jurisprudence.[21]

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[19] The sole exception, of course, is when Congress is acting in express furtherance of a special power granted by a subsequent Amendment, such as Section 5 of the Fourteenth Amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 453-56 (1976). Even here, the Court has required "an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.'" *Atascadero*, 105 S. Ct. at 3146, *quoting Quern v. Jordan*, 440 U.S. 332, 342 (1979).

[20] In some instances, of course, principles of federalism and state sovereignty may themselves limit Congress' power. *See generally Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005 (1985); *see also Coyle v. Oklahoma*, 221 U.S. 559 (1911).

[21] *Compare* Justice Marshall's opinion for a unanimous Court in *Kentucky v. Graham*, 105 S. Ct. at 3107 ("absent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court") *with* the sharp division of the Justices in *Atascadero*.

C. *Parden* Exemplifies The Error Of Interpreting The Eleventh Amendment As Merely An Incorporation Of The Sovereign Immunity Doctrine.

In this Court's cases, the only significant departure from the understanding that the Eleventh Amendment imposes a jurisdictional limitation on the federal courts is *Parden v. Terminal Railway*, 377 U.S. 184 (1964). *Parden* rests upon an apparent confusion between that jurisdictional limitation and the substantive doctrine of sovereign immunity.

In *Parden*, the Court began by correctly identifying the two issues presented by that case, distinguishing between 1) the question whether Congress intended to subject the States to regulation under the Federal Employers' Liability Act ("FELA"); and 2) the question whether a FELA suit could be prosecuted against a State in federal court. But the Court posed and answered those questions in the wrong order. The Court determined *first* that Congress' broad purposes in enacting FELA contemplated bringing a State, as an employer, within the scope of the Act. Only after determining that the State was indeed subject to the Act did the Court determine whether a suit against a State under the Act could be entertained in federal court. This schedule for deciding the issues tends to reverse the ordinary agenda for decision in the federal courts, which requires a federal court to pass upon jurisdictional questions before reaching any issues on the merits. *See* 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3522 (2d ed. 1984); *cf.* Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). *Parden*'s ordering of the questions may be appropriate if *Hans* described only an affirmative "sovereign immunity" defense on the merits to a federal claim; but it is fundamentally wrong in light of *Hans*' statement of a jurisdictional rule.

Parden's failure clearly to distinguish between the common law doctrine of sovereign immunity and the Eleventh

Amendment's jurisdictional limit on suits against the States clouded the Court's analysis in at least three ways. *First*, this failure led the Court to rely largely on notions of constructive waiver, implied consent, and distinctions between governmental and proprietary activities, concepts which have been fixtures of state law immunity jurisprudence for many years.[22] Because the Court in *Parden* focused on the issue of sovereign immunity, rather than jurisdiction, these doctrines were not out of place. But fictions that may permissibly characterize common law adjudication have little place in federal jurisdictional jurisprudence.

Second, because the Court in *Parden* saw the issue as one of sovereign immunity, it found in the Supremacy Clause the logical answer to the difficulty posed by sovereign immunity in a federal question case: "By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." *Parden*, 377 U.S. at 192. In short, sovereign immunity could not be a defense to a federal claim. Thus, after finding the States within the intended scope of FELA, the Court had little difficulty holding that the State was likewise subject to suit in federal court under that Act. It was the *Parden* Court's failure to heed the jurisdictional limitation at the core of the Eleventh Amendment that led it to conclude that because Congress may subject a State to regulation in the exercise of its Commerce Clause powers, Congress is also empowered to subject the State to a private suit in federal court.[23]

[22] State courts, construing state common law doctrines of immunity, have felt impelled to riddle sovereign immunity with exceptions so as to give effect to the principle that a person who is wronged will have a remedy. *See generally* 3 K. Davis, *Administrative Law Treatise* ch. 25 (1958). This judicially felt need to afford an injured party a remedy, which has apparently motivated many state legislatures to develop exceptions to the immunity rule (*see* K. Davis, *Administrative Law of the Seventies* § 25.00-1, at 555 (1976)), should have no bearing in the Eleventh Amendment context. Not only are the federal courts without authority to expand or contract the constitutional limits on their jurisdiction, but the elimination of a remedy in federal court does not deprive any litigant of all remedies whatsoever because the state courts remain as forums for their claims.

Third, having concluded that States fell within the logical scope of FELA, the Court in *Parden* mistakenly equated the failure to permit federal court FELA suits against the State with the congressional creation of a "right without a remedy." 377 U.S. at 190. As we have noted, this view fails to appreciate the role that state courts may play in the adjudication of federal rights. *See Atascadero*, 105 S. Ct. at 3146 n.2. Assuming, *arguendo*—consistent with *Parden's* broad view of the surrender of substantive state sovereignty inherent in the Supremacy Clause—that Congress intended to subject the States to liability, it should have been apparent that the state courts were the appropriate forum to effectuate that intent. Thus, state employees would not have been left without a remedy.

It is thus clear that the reasoning of *Parden*—at least its jurisdictional, as opposed to its substantive law, reasoning—is thoroughly inconsistent with the jurisdictional nature of the Eleventh Amendment, and with the more recent cases establishing a strict standard for determining state waiver. *See Atascadero*, 105 S. Ct. at 3147; *Pennhurst*, 465 U.S. at 99; *Florida Dept. of Health v. Florida Nursing Home Assn.*, 450 U.S. 147, 150 (1981) (*per curiam*). Those more recent cases should be followed here.

[23] This expansive view of congressional power to override the resistance of the State to suit was, as pointed out above, implicit in *Parden*. But *Parden* itself was internally inconsistent. For if Congress possesses the constitutional power to subject a State to private suit in federal court on a federal claim, one hardly needs a fictive notion of "consent" to justify the exercise of that power. As shown below, *Parden* correctly discerned the need for consent; but it incorrectly believed that Congress has the power to subject the States to federal court suit at its whim.

D. This Case Must Be Dismissed For Want Of Jurisdiction.

Appreciation of the jurisdictional nature of the Eleventh Amendment clarifies several of the issues raised by the various opinions below. *First*, Congress' plenary legislative power over maritime matters does not affect the disposition of this case in any way. Congress does not have the power to expand the jurisdiction of the federal courts beyond that granted in Article III. The fact that this case arises from the exercise of Congress' admiralty power is thus irrelevant. Congress has the power to subject a State to suit in federal court, and thereby override the jurisdictional prohibition on suits by individuals against the State, only when acting pursuant to its enforcement powers under Section 5 of the Fourteenth Amendment, which has been held by necessary implication to have repealed the jurisdictional limitations of the Eleventh Amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). By contrast, the jurisdictional bar of the Eleventh Amendment applies with full force to actions in admiralty, which was part of the Constitution at the time of ratification. *See Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.17 (1982); *Ex Parte State of New York, No. 1*, 256 U.S. 490, 498-99 (1921). Congress' admiralty power is "plenary" in the same sense as is the commerce power, but it does not authorize Congress to override a constitutional limitation on federal court jurisdiction.

Second, because a federal court must address issues going to its jurisdiction before reaching the merits of a case, the issue whether the federal district court can entertain petitioner's claim must be resolved prior to any analysis of congressional intent to subject States to Jones Act liability. It is well settled that should a court find itself without jurisdiction, it is precluded from passing upon any question going to the merits, whether of law or fact. *See Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). Whether Congress intended to make States

liable to Jones Act suits has no bearing on the jurisdictional issue.[24]

Because the Eleventh Amendment deprived the district court of jurisdiction to hear petitioner's suit against the State of Texas, and because the question of jurisdiction is a threshold issue, this action must be dismissed.

II. THE STATE OF TEXAS HAS NOT CONSENTED TO JONES ACT SUIT IN THE FEDERAL COURTS, AND THE "CONSTRUCTIVE CONSENT" DOCTRINE APPLIED IN *PARDEN* SHOULD NOT BE EXTENDED TO THIS CASE.

It has long been held that despite the jurisdictional limitation of the Eleventh Amendment, a State may consent to suit in a federal court, a principle with which *amici* do not disagree. The very notion that a State's consent to suit can confer jurisdiction on a federal court where it otherwise would not exist may seem somewhat anomalous at first glance. *See Employees*, 411 U.S. at 294 n.10 (Marshall, J., concurring). The apparent anomaly disappears, however, when one considers that the rule itself arises from the understanding that the federal courts possess only the judicial power that was originally granted them by the States and that the unwarranted expansion of federal jurisdiction encroaches on those powers that have been reserved to the States. For this reason, the courts have recognized consent by the State itself to suit as an exception to a strict application of the principle of nonwaivable limits on federal jurisdiction. *Ibid.*

Consent to jurisdiction, however, is far different from the concept of implied waiver used in *Parden*. Because

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[24] *Cf. Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 289 (1959) (Frankfurter, J., dissenting) (on the grounds that the Jones Act suit against the State was barred by the Eleventh Amendment and the Court should therefore have declined to reach the substantive issues).

Parden mistakenly equated the question of congressional intention *to regulate* the States with the jurisdictional inquiry, it articulated a doctrine of waiver that would hold a State subject to suit in federal court any time that it was subject to federal legislation. This is error, for the issues are distinct. By operating a ferry, the State of Texas may have engaged in an activity subject to federal control, and thereby subjected itself to federal *regulation*. But this activity did not amount to actual consent to suit in federal court.[25] Given the expansive scope of federal regulatory power, if a State may be held to consent to federal court jurisdiction by simply "enter-[ing] into activities subject to congressional regulation" (*Parden*, 377 U.S. at 196), then "consent" is not a meaningful reflection of the will of the State, but instead merely the manifestation of congressional power and intent.

"Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights . . ." (*Edelman v. Jordan*, 415 U.S. at 673), and it does not comport with our understanding of the effect of jurisdictional limitations on federal courts. In this context, meaningful consent to waive the jurisdictional protections of the Eleventh Amendment should reflect *the State's* voluntary and knowing decision to allow itself to be held subject to suit in the federal courts. A jurisdictional constraint founded in the Constitution limits not only the federal judicial power but also Congress' ability to expand that power. It is a protection given for the benefit of the State, and thus although the State may consent, that consent should, under the constitutional plan, be a reflection of the State's will, and not of congressional overreaching.

The decision to allow federal court suit may be initiated by the State itself through either a general or

[25] *See Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 468 (1945).

specific statute granting consent to such suit. In some circumstances, state consent may be exchanged voluntarily for some direct federal benefit granted to a State by the federal government. At a minimum, however, for consent to be meaningful in the context of a *quid pro quo* arrangement between a State and the federal government, the terms and conditions of the exchange—the precise benefit being given and the breadth of the consent granted—must be clearly described before the deal is struck.[27] In short, unless the bar of the Eleventh Amendment is held to be a dead letter with respect to all federal law claims, state consent to suit cannot be as broad as the doctrine suggested by *Parden*, but must instead be the reflection of an actual decision *by the State* to submit to the jurisdiction of the federal courts.

In deciding whether a State has consented to federal court suit, this Court, both before and after *Parden*, has repeatedly held that "we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Edelman v. Jordan*, 415 U.S. at 673, *quoting Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909). *See also Kentucky v. Graham*, 105 S. Ct. at 3106 n.14; *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 54 (1944); *Smith v. Reeves*, 178 U.S. 436, 441 (1900). The Court has ruled that active state participation in a program of federal assistance for state operation of a system of public aid is not sufficient to establish consent (*Edelman v. Jordan*, 415 U.S. at 673); that the State's explicit agreement to abide by federal law as a condition for participation in a federal program is not a waiver (*Florida Dept. of Health*, 450 U.S. at 150); and that a statute that expressly grants a general consent to suit

[26] No deal has been struck under the Jones Act, for none of the formalities of exchange is present. Congress did not ask for, and the State of Texas did not give, its express consent to suit.

will not be construed as a waiver of objection to suit in *federal* court (*Smith v. Reeves*, 178 U.S. at 441). Therefore, it is plain that where, as here, the State has done nothing at all to indicate acquiescence to suit in federal court except to engage in activities "subject to federal regulation," there has been no meaningful consent to jurisdiction.

Parden's broad implied waiver doctrine is out of step with this Court's other decisions and with fundamental constitutional principles. Because the State of Texas has not unequivocally expressed its intention to subject itself to suit in federal court, the district court had no jurisdiction in this case.

Thus, the Court should not address the substantive question whether the Jones Act applies to petitioner. Given the absence of federal jurisdiction, it is neither advisable nor proper for the Court to reach the substantive issues arguably presented by this case. *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868); *see also Petty*, 359 U.S. at 289 (Frankfurter, J., dissenting). Those issues should first be considered by the courts of the State, which share statutory jurisdiction with the federal courts over Jones Act suits. *See Lauritzen v. Larsen*, 345 U.S. 571, 574 n.4 (1953); *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 43 (1943); *Engel v. Davenport*, 271 U.S. 33, 37-38 (1926).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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